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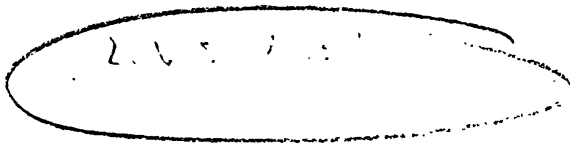
A  
COMPENDIUM  
AND  
DIGEST OF THE LAWS  
OF  
MASSACHUSETTS.

BY WILLIAM CHARLES WHITE,  
Counsellor at Law.

"MISERA SERVITUS, EST, UBI JUS EST VAGUM, AUT INCOGNITUM."

VOL. II...PART II.

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**DISTRICT OF MASSACHUSETTS, TO WIT:**

BE it remembered, That on the fourth day of August in the thirty-fifth year of the Independence of the United States of America, WILLIAM CHARLES WHITE, of the said district, has deposited in this office the title of a book, the right whereof he claims as author, in the words following, to wit:

"A COMPENDIUM and DIGEST of the LAWS OF MASSACHUSETTS, By WILLIAM CHARLES WHITE, Counsellor at law. " *Miscra servitus est, ubi jus est vagum, aut incognitum.*" Vol. II....Part. II.

In conformity to the act of the Congress of the United States, intituled, "An Act for the Encouragement of Learning, by securing the Copies of Maps, Charts, and Books, to the Authors and Proprietors of such copies, during the times therein mentioned;" and also to an act intituled, "An act supplementary to an act, intituled, an act for the encouragement of learning, by securing the copies of Maps, Charts, and Books, to the authors and proprietors of such copies during the times therein mentioned; and extending the benefits thereof to the Arts of Designing, Engraving, and Etching Historical, and other Prints."

WILLIAM S. SHAW,  
Clerk of the District of Massachusetts.

**DIGEST**  
**OF THE**  
**LAWS OF MASSACHUSETTS.**

**TITLE LXII.**

**FERRIES AND FERRY-MEN.**

1. **O**f the manner of licensing ferry-men.
2. Duty of towns to provide ferry-men, and penalty for neglect.
3. Duty of ferry-men ; and penalty for neglect of such duty.
4. Liability of unauthorized persons who act as ferry-men.

**I. Of the manner of licensing ferry-men.**

Licenses for keeping ferries may be obtained from the court of general sessions of the peace of the county wherein such ferry may be ; and the said court is empowered to grant such licenses to such person or persons as shall be judged suitable for such service by the same court ; and to state the fare or ferriage at each ferry, for passengers, horses, and other creatures, carriages, wagons, carts, teams, and other things there transported, always having regard to the breadth and situation of, and the more or less passing, at any ferry ; in all cases taking bond, with sufficient sureties of each ferry-man, for the faithful performance of the duties and services of his place.

Stat. 1796, c. 42, s. 1.

Ferriage to be stated by law.

Ferry-men to give bond.

## FERRIES AND FERRY-MEN.

## II. Duty of towns to provide ferry-men, and penalty for neglect.

Ibid. s. 4.

Duty of towns to provide ferry-men; such persons to be licensed and to give bonds.

The same statute has further provided, that whenever the court of general sessions of the peace of any county in this commonwealth, shall judge it necessary to set up a ferry for the convenience of passing any river or waters, and no person shall appear to keep the same for the stated profits thereof; the town or district wherein such ferry may be, shall take effectual care to provide a suitable person or persons to keep and attend the same, at such place, and in such times of the year, as the said court shall judge necessary; which person or persons shall be licensed by such court as aforesaid. And the said court shall take bonds with sureties of such persons for the faithful performance of the duties and services of their places, and state the fare or ferriage to be demanded and received at such ferry; having regard to the breadth and situation of, and the more or less passing at the same.

Ibid. s. 5.

Towns, each side a river, alternately to provide ferry-men.

The same statute hath further provided, that if any such ferry so judged necessary, shall be over any river or water, when one town or district joins thereto on one side, and another town or district on the other side, in such case the said towns and districts shall, either jointly or alternately, provide such person or persons to keep such ferry as the said court shall order.

Ibid. s. 6.

Penalty for neglect.

To whose use such penalty shall accrue.

Mode of recovery.

The same statute hath further provided, that any town or district, neglecting to provide suitable persons to keep ferries as aforesaid, shall forfeit and pay *forty dollars* for each month's neglect; one moiety thereof to the use of the commonwealth, and the other moiety to him or them who shall inform and sue for the same. And all the forfeitures aforesaid which may be incurred, shall be recoverable in an action of debt, with costs of suit, before a justice of the peace or court of common pleas of the county wherein the ferry may be, according to the amount of the forfeitures to be recovered.

III. Duty of ferry-men; and penalty for neglect of such duty.

The same statute hath further provided, that all ferry-men, at the several ferries in this commonwealth, shall keep a good boat or boats, in good repair, suitable to the water they are to ferry over, and give ready and due attendance on passengers on all occasions, for the times, and according to the regulations established at any ferry; and the keeper or keepers of each ferry, for every neglect of such attendance shall forfeit and pay *one dollar*, and for every neglect in keeping such a boat, *twenty dollars*; one moiety thereof in each case to the use of the commonwealth, and the other moiety to him or them who shall inform and sue for the same; and be further liable to pay in an action on the case, all such special damages as any person shall sustain by such neglect.(1)

*Ibid.* s. 2.

To keep good boats and give ready attendance.

Penalty for neglect.

To whose use such penalty shall accrue.

Further liable in an action for damages.

IV. Liability of unauthorized persons, who act as ferry-men.

The same statute has further provided, that if any person or persons shall keep a ferry, or transport passengers over or across any stated ferry so as to demand or receive pay, having no right or authority so to do, he shall forfeit and pay for every such offence, *four dollars*; one moiety thereof to the commonwealth, and the other to him or them who shall inform and sue for the same; and be further liable, in a special action on the case, to pay such damages as may or shall accrue to the person or persons assigned and authorized to keep any such stated ferry or ferries.

*Ibid.* s. 3.

Penalty.

Further liable in an action for damages.

(1) If the ferry-men be provided by the town, in such case, one moiety of the forfeiture goes to such town instead of the commonwealth. Stat. 1796, c. 42, s. 4.

TITLE LXIII.

FIELD-DRIVERS.

**B**y statute it is enacted, that there shall be chosen at the annual meeting for the choice of town officers, in each town, two or more persons for field-drivers, who shall be sworn to the faithful discharge of their trust; and the field-drivers thus chosen and sworn, are severally authorized and empowered, to take up and impound any swine unyoked and unringed, horses unfettered, sheep not under the care of a shepherd or going at large on the common or highways leading through such town, between the fifteenth day of *April*, and the first day of *November*, and them in pound detain, or deal with, according to law, until the owner shall pay for the use of the field-driver, *one shilling* a head, for all such horses, and *three pence* a head for all sheep and swine; besides *two pence* a head for all such horses, and *one penny* for all sheep and swine, to the pound keeper, who may have the care of the particular pound in which they may be restrained.

They have likewise authority to impound creatures taken *damage feasant*.

So also the proprietors of any common field, or the major part of such of them as shall be present at a meeting legally warned for that purpose, may choose haywards or field-drivers, who shall be under oath, and shall have the same powers as if they had been chosen by a town.

A person who rescues any creatures taken up, *damage feasant*, from the hands or care of the field-driver in his way with them to the pound, forfeits *forty shillings*, to be recovered in an action of debt, one moiety to him or them that will sue for the same, and the other moiety to and for the use of the county within which the offence is committed; and is further liable to pay the party injured, the full damages he might be entitled to recover by impounding such creatures, in an action of the case.

Stat. 1786, c. 66, s. 2.

Towns empowered to choose field-drivers.

Their authority.

Their fees.

Ibid. s. 3.

Stat. 1786, c. 66, s. 4.

Stat. 1788, c. 65, s. 6.

Penalty for rescuing creatures from the field-driver.

TITLE LXIV.

FIRE AND FIRE-WARDS.

1. **O**f the choice of fire-wards ; and the penalty for their refusal to serve.
2. Their power ; and the penalty for non-obedience of their commands.
3. Liability of those who plunder property at fires.
4. Provision against the danger of fire, by reason of sail or rigging lofts, and livery stables.
5. Liability of those who voluntarily and unnecessarily set fire to woods.
6. Liability of those who make bonfires, or other fire-works. (1.)

I. Of the choice of fire-wards ; and the penalty for their refusal to serve.

By statute it is enacted, that each town in this commonwealth, in their March or April meeting annually, wherein the qualified voters shall think it expedient to choose fire-wards, shall have power to elect such number of suitable persons to be fire-wards therein, as shall be deemed necessary ; and each person, so elected, shall be notified thereof within three days, and shall, within three days after being so notified, enter his acceptance or refusal of the said office with the town clerk.

Stat. 1796, c. 22, s. 1.  
Appointment of fire-wards.

And if any person, being so elected and notified, shall neglect to enter his acceptance or refusal as aforesaid, he shall forfeit and pay *ten dollars*, unless excused by the

Ibid.  
Penalty for not serving.

(1) Of damages, where buildings are prostrated to prevent an increase of fire, see title DAMAGES, page 378.

## FIRE AND FIRE-WARDS.

town ; and the town shall have power to elect another in his place, in case of such neglect or refusal.

*Ibid.*

Badge of office.

And when any fire shall break out in any town, where-in fire-wards shall be appointed, they shall immediately attend thereat, and carry with them a suitable staff, or badge of their office.

II. Their power ; and the penalty for non-obedience of their commands.

*Ibid.* s. 2.

Fire-wards, etc. may direct the pulling down of any building, to prevent the spreading of fire.

The same statute has provided, that, when any fire shall break out, in any town, the fire-wards thereof, who shall be present in the place of immediate danger, or any three of them, and where no fire-wards shall be appointed, a major part of the selectmen present, or, in their absence, two or three of the civil officers present, or, in their absence, two or three of the chief military officers of said town, present, shall have power to direct the pulling down, or demolishing, any such house or building, as they shall judge necessary to be pulled down, or demolished, in order to prevent the further spreading of the fire.

*Ibid.*

Their power to require assistance at fires.

And, during the continuance of any fire, the said fire-wards, or officers, as the case may be, shall have power to require assistance for extinguishing the same, and for removing any furniture, goods, or merchandize, from any building on fire, or in danger thereof ; and to appoint guards to secure the same ; and also assistance for pulling down, or demolishing any house, or building, as the case may require ; and further, to suppress all tumults and disorders.

And to suppress tumults.

*Ibid.*

To appoint the stations of engines, etc.

And the said fire-wards, selectmen, or officers, as the case may be, shall have authority to direct and appoint the stations and operations of the engine-men, with their engines, and of all other persons, for the purpose of extinguishing the fire, and preventing its increase.

*Ibid.*

And if any person shall refuse, or neglect, to obey any order given by said fire-wards, or officers, in the pre-

refuses, the person so offending, shall forfeit and pay, for each offence, *ten dollars*. Penalty for non-obedience of their commands.

### III. Liability of those who plunder property at fires.

The same statute has further enacted, that, if any person shall, in such case of fire, plunder, purloin, embezzle, Ibid. s. 4. convey away, or conceal, any furniture, goods or chattels, rights or credits, merchandize or effects, of the inhabitants, whose houses or buildings shall be on fire, or endangered thereby, and said inhabitants shall be put upon removing the same, and shall not restore, or give notice thereof to the owner, (if known) or to one of the fire-wards of the town, or bring them into such public place as shall be assigned by the selectmen of the town, within two days after public notice shall be posted in some public place, in the town, by the selectmen thereof, for that purpose, the person or persons so offending, and being thereof convicted, shall be deemed guilty of *larceny*, and punished accordingly.

### IV. Provision against the danger of fire, by reason of sail or rigging lofts, and livery stables.

The same statute has further enacted, that if any person shall occupy or improve any tenement or building Ibid. s. 5. whatever, in any part of any maritime town in this commonwealth, for the business or employment of a sail-maker, or rigger, or keeper of a livery stable, except only in such parts of the town as the selectmen thereof, or a major part of them, shall direct and determine, such sail-maker or rigger, so offending, shall forfeit and pay, for each offence, *ten dollars*; and such keeper of a livery stable shall forfeit and pay, for each offence, *fifty dollars* for every month so occupying the same, and so in proportion for a longer or shorter time.

### V. Liability of those who voluntarily and unnecessarily set fire to woods.

*Ibid.* s. 6.

The same statute has further enacted, that if any person or persons shall, wittingly or willingly, set fire to any woods or lands lying in common, or to woodland, or other land held in severalty, and not his own, within this commonwealth, without leave first had and obtained from the owners of the land, or those who have a right to give the same leave ; excepting in cases in which it may become necessary to make back-fires to stop the progress, or subdue any fire that may be spreading ; the person so offending, shall forfeit and pay, for each offence, *ten dollars*, one moiety thereof to the use of the commonwealth, and the other moiety thereof to the use of him or them that shall inform for the same ; and shall be liable in a special action on the case, to pay damages to all persons injured by such fire, including the injury that may be done by any necessary back-fire made for the purpose aforesaid.

Forfeiture.

Action on the case also lies for the injured party.

*Ibid.*

Parents and masters liable for the penalty for the offences of their children, or servants, under age.

And in case any person under age shall offend, such penalty shall be recovered of the parent or master respectively of such person under age, unless it shall appear, that such person under age was employed or directed by some person other than the parent or master ; in which case, the person so employing or directing, shall be liable therefor.

Recovery of the fines.

And the fines in this section mentioned, may be recovered in an action of debt, with costs of suit.

VI. Liability of those who make bonfires, or other fire-works.

Stat. 1796, c. 82, s. 11.

Bonfires interdicted.

By statute it is enacted, that if any person, or persons, shall set fire to any pile, or combustible stuff, or be any ways concerned in causing, or making a bonfire, in any street or lane, or any other part of any town or district within this commonwealth, such bonfire being within ten rods of any house or building, every person so offending, shall, for each offence, forfeit and pay the sum of *eight dollars*, or be imprisoned not exceeding *one month*.

Penalty.

Said fine to be recovered, with costs of prosecution, one moiety of said fine to the use of the poor of the town or district wherein the offence shall be committed, and the other moiety to him, or them, who shall sue for the same.

*Mode of recovery.*

*To whose use.*

And all masters are made liable to pay the fine aforesaid, for the offences of their servants; and all parents for the offences of their children, under age, and not being servants.

*Ibid.*

Parents and masters answerable for the offences of their children and servants.

Another statute has also provided, that, if any person shall offer for sale, set fire to, or throw any lighted cracker, squib, rocket, or serpent, within this commonwealth, without the license of the selectmen of the several towns respectively, first obtained therefor, he shall forfeit, for every such offence, the sum of *five dollars*; one moiety to the use of the poor of the town, in which the offence shall be committed, and the other moiety to the use of the prosecutor; to be recovered by action of debt, or by information before any justice of the peace of the county in which the offence shall be committed, with the costs of suits.

*Stat. 1805, c. 55.*

Squibs, etc. prohibited.

*Penalty.*

*To whose use.*

*Mode of recovery.*

## TITLE LXV.

## FISHERY AND FOWLING.

Stat. 1641.

Thomas's ed. Laws.  
3 Vol. p. 140.  
Appendix.

**B**y statute it is enacted, that every inhabitant, who is an householder, shall have free fishing and fowling in any great ponds, bays, coves, and rivers, so far as the sea ebbs and flows, within the precincts of the town where they dwell, unless the freemen of the same town, or the general court have otherwise appropriated them. *Provided*, that no town shall appropriate to any particular person, or persons, any great pond, containing more than ten acres of land; and that no person shall come upon another's propriety without their leave, otherwise than as hereafter expressed; the which clearly to determine: It is declared, that in all creeks, coves, and other places about and upon salt water, where the sea ebbs and flows, the proprietor of the land adjoining shall have the propriety to the low-water-mark, where the sea doth not ebb above an hundred rods, and not more wherever it ebbs further. *Provided*, that such proprietor shall not, by this liberty, have power to stop or hinder the passage of boats, or other vessels, in, or through any sea, creeks, or coves, to other men's houses, or lands. And for great ponds, lying in common, though within the bounds of some town, it shall be free for any man to fish and fowl there, and may pass and repass, on foot, through any man's propriety for that end, so they trespass not upon any man's corn, or meadow. (1)

(1) In the case of *Coolidge v. Williams*, 4 Mass. Rep. 144, the court remarked, that "towns adjoining or extending across a navigable river, may own the soil of the flats, and even of the channel, if a grant has been obtained from the government; but the property of the fish, and also of all tide-waters, is in the public. But it seems

to be a part of the common law of the state, that the town may appropriate the fish, if not appropriated by the legislature ; but for taking the fish, no man could lawfully go on the soil of another without his leave. This rule of our common law, probably, originated from a declaration of *common* liberties, made by the general court of the colony of *Massachusetts Bay*. If, therefore, no appropriation has been made of the fish, any citizen may take them, so that he does not trespass on the land of others. But any town, adjoining any river, may appropriate the fish taken within its limits ; and, that the town, on the opposite side of the river, may have the same right, the limits must not include the tide-waters ebbing and flowing, but the shores on which the fish are drawn and placed, when they may be said to be taken according to the intent of this privilege. If the fish, when caught swimming in the public tide-waters, are to be considered as taken within the limits of any town, before they are hauled on shore, it will be difficult, in many cases, to define the interfering rights of towns, situate on opposite banks : And when the channel is not granted, fish swimming there, out of the limits of any town, would not be subject to appropriation.

“ The power of appropriation, only, not meeting the wishes of many towns, acts have been passed authorizing them, not only to fix the times and manner of taking the fish, but also the places, and the disposition of them when taken ; and to sell the exclusive right of fishing ; and guarding this authority with pecuniary penalties. And the place of fishing is always understood to be, that part of the shore used for employing seines and nets, or other engines, and for bringing the fish to land ; and not any part of the tide-waters in which they were swimming.”

TITLE LXVI.

FORCIBLE ENTRY AND DETAINER.

Can. Diet. cites  
1 Hawk. 140.

AT common law, a man disseized of any lands, or tenements, if he could not prevail by fair means, might lawfully regain the possession by force, unless he were put to a necessity to bring his action, by having neglected to enter in due time.

Can. Diet. cites  
1 Hawk. 141.

But this indulgence of the common law, in suffering persons to regain the lands they were unlawfully deprived of, having been found by experience to be very prejudicial to the public peace, by giving an opportunity to powerful men, under the pretence of feigned titles, forcibly to eject their weak neighbours, and also by force to retain their wrongful possessions, it was thought necessary by many severe laws to restrain all persons from the use of such violent methods of doing themselves justice.

In England, the first of these laws was enacted in the reign of Edward the third, and the last in the reign of James the first.

Stat. 1784, c. 8, s. 1.

Two justices, *quorum unus*, may inquire into a forcible entry and detainer by a jury.

On this subject, there is a statute of this commonwealth, which enacts, that two justices of the peace, *quorum unus*, shall have authority to inquire by a jury, as well against those who make unlawful and forcible entry into lands or tenements, and with a strong hand detain the same, as against those who, having a lawful and peaceable entry into lands or tenements, unlawfully and by force hold the same. And if it be found, upon such inquiry, that an unlawful and forcible entry hath been made, and that the same lands or tenements are held and detained with force and a strong hand; or that the same after a lawful entry are held unlawfully, and with force and a strong hand; then that such justices shall cause the party complaining to have restitution thereof.

1. What will amount to a forcible entry, or a forcible detainer.

2. Proceedings by which to recover the possession against the wrongdoer.

3. The evidence.

I. What will amount to a forcible entry, or a forcible detainer.

A forcible entry must regularly be with a strong hand, with unusual weapons, or with menace of life or limb. <sup>2 Bac. Abr. 592.</sup>

If a man enters *peaceably* into a house, but turns the party out of possession by force ; or, by threats, frights him out of possession, it is in law, a forcible entry. <sup>Ibid.</sup>

If a house be bolted, it is forcible to break it open ; but it is not so to draw a latch and enter into the house ; and if a man whose entry is lawful, shall entice the other out of the house, and enter, the door being open, or only latched, his entry is justifiable. <sup>Ibid.</sup>

If one find a man out of his house, and forcibly withhold him from returning to it, and send persons to take peaceable possession thereof, in the party's absence, this, by some opinions, says *Hawkins*, is no forcible entry, inasmuch as he did no violence to the house, but only to the person of the other ; but he himself is of a contrary opinion, for though the force be not actually done upon the land, nor in the very act of entry, yet since it is used with an immediate intent to make such entry, and the manner of doing it only prevents the opposition, it cannot be said to be without force. <sup>Ibid.</sup>

If several come in company, where their entry is not lawful, and all of them, saying one, enter in a peaceable manner, and that one only uses force, it is a forcible entry in them all ; because they come in company to do an unlawful act : and therefore, the act of the one is the act of them all, and he is presumed to be only the instrument of the rest. But otherwise it is, where one had a right of entry ; for there they only come to do a lawful act, and therefore it is the force of him only who used it. <sup>Ibid. 559.</sup>

*Ibid.*

If he who hath an estate in land by a defeasible title, continues with force in the possession thereof, after a claim made by one who had a right of entry thereto, he shall be adjudged to have entered forcibly.

*Ibid.*

The same circumstances of violence or terror, which will make an *entry* forcible, will make a *detainer* forcible also; from whence it follows, that whoever keeps in the house an unusual number of people, or unusual weapons, or threatens to do some bodily harm to the former possessor, if he dare return, shall be adjudged guilty of a forcible detainer, though no attempt be made to re-enter.

*Ibid.*

So it hath been said, that he also shall come under the like construction, who places men at a distance from the house, in order to assault any one who shall make an attempt to enter it. But it is said, that a man ought not to be adjudged guilty of this offence, for barely refusing to go out of a house, and continuing there in despite of another.

## II. Proceedings by which to recover the possession against the wrongdoer.

Stat. 1784, c. 8, s. 2.

Complaint to the justices.

Their warrant to the sheriff to summon a jury.

The injured party must state his case by complaint, formally made in writing to two justices of the peace, *quorum unus*; upon which it will be their duty to make out their warrant under their hands and seal, directed to the sheriff of the same county, commanding him, in behalf of the commonwealth, to cause to come before them, twelve good and lawful men of the same county, each one of whom having freehold lands or tenements of the yearly value of *forty shillings*.

See Append. No. 1.

The form of this warrant is prescribed by statute, and may be seen in the appendix.

Stat. 1784, c. 8, s. 2.

Summons to the adverse party.

The justices must then make out, under their hands and seal, a summons to the adverse party, requiring him to appear at a time and place therein named, to answer to the complaint which has been exhibited against him.

See Append. No. 2.

The form of this summons is also prescribed by statute, and may be seen in the appendix.

This summons must be served upon the adverse party, personally, or a copy thereof must be left at his last and usual place of abode, seven days exclusively before the day appointed, by the justices, for the trial.

Stat. 1784, c. 8, s. 2.

Service of the summons on the adverse party.

If, when the jury appear, there shall happen, by accident or challenge, not to be a full jury, the sheriff shall fill the pannel, *de talibus circumstantibus*, as in other cases.

Ibid.

Proceedings when there is not a full jury.

When the pannel is filled, the justices must then lay before the jury the exhibited complaint, and administer to them their oath.

Ibid.

Jurors' oath.

The form of this oath is also prescribed by statute, and may be seen in the appendix.

See Append. No. 3.

If the jury, after a full hearing of the cause, shall find the complaint laid before them, supported by evidence, they shall all sign their verdict in form, as prescribed by statute.

Stat. 1784, c. 8, s. 2.

The form of the verdict may be also seen in the appendix.

See Append. No. 4.

Upon the return of such verdict, it is the duty of the justices to enter up judgment, that the complainant have restitution of the premises, and to award their writ of restitution accordingly. But if no such verdict be returned, the respondent shall be allowed his legal costs, and have his execution therefor.

Writ of restitution.

Stat. 1784, c. 8, s. 3.

Ibid. s. 2.

Respondent entitled to costs, in case—

The form of the writ of restitution is also prescribed by statute, and may be seen in the appendix.

See Append. No. 5.

There is no appeal from the judgment of the justices. Neither will such judgment be a bar to any after action brought by either party; nevertheless, if the proceedings be irregular, they may be removed, by *certiorari*, into the supreme judicial court holden in the county where the complaint was tried.

Stat. 1784, c. 8, s. 3.

No appeal.

Proceedings may be removed by *certiorari*.

### III. The evidence.

In all cases of a forcible entry, it is apparent, that the only inquiry must be respecting the *force*; and not with

2 Swif. Syst. L. C. 71.

3 Bl. Com. 179.

Ibid. 4.

regard to the *right of property, or possession*: For, in such cases, no person has a right to obtain possession of his own lands, or tenements, by force; because it would disturb the public peace. And the public peace is a superior consideration to any one man's private property; as if individuals were once allowed to use private force as a remedy for private injuries, all social justice must cease, the strong would give law to the weak, and every man would revert to a state of nature.

2 Swift. Syst. L. C. 72.

In respect to the true import of forcible *detainer*, there seems to be more doubt and uncertainty. A forcible, or wrongful detainer may be after a forcible entry; or after an unlawful but peaceable entry; or after a lawful and peaceable entry. If a person should be absent from his house, a short time, and another enter quietly, if, on return of the owner, the person thus entering, hold possession by force, and a strong hand, it is a forcible *detainer*. So, if I lease, for a short time, houses, or lands, and the lessee enters; his entry is lawful and peaceable: But if he holds over his term, by force and violence, he is guilty of a wrongful and forcible detainer. But here, in the case of a *detainer*, it is necessary that there be an inquiry respecting the *right of possession*: For a stranger may come and attempt to take possession of my house, and I may resist him with force. If there can be no inquiry respecting the right, he may turn me out of my house, on account of the force I employed to defend it. But then, upon this process, no inquiry can be made, and no decision be had respecting the *title*. The right of *possession* must be the only inquiry.

Stat. 1784, c. 8, s. 3.

It is proper here to observe, that our statute of FORCIBLE ENTRY AND DETAINER contains a *proviso*, which declares, that its provisions shall not extend to any person, who has had the occupation of any lands, or tenements, by the space of three whole years together, next before, and whose estate therein is not ended nor determined.

TITLE LXVII.

**FORESTALLING, REGRATING AND  
ENGROSSING.**

1. **FORESTALLING.** Forestalling, which is an offence, at common law, consists in the buying, or contracting for any merchandize, or victuals, coming in the way to market; or dissuading persons from bringing their goods, or provisions there; or persuading them to enhance the price, when there; any of which practices make the market dearer to the fair trader. <sup>4 Bl. Com., 159.</sup>

2. **REGRATING.** This offence is described to be the buying of corn, or other dead victuals, in any market, and selling it again in the same market, or within four miles of the place. For this also enhances the price of the provisions, as every successive seller must have a successive profit. <sup>Ibid.</sup>

3. **ENGROSSING.** This offence is also described, to be the getting into one's possession, or buying up, large quantities of corn, or other dead victuals, with intent to sell them again. This must, of course, be injurious to the public, by putting it in the power of one or two rich men to raise the price of provisions at their own discretion. And so the total engrossing of any other commodity, with intent to sell it at an unreasonable price, is an offence indictable and fineable, at the common law. <sup>Ibid.</sup>

4. The general penalty for these offences, is discretionary fine and imprisonment. <sup>Ibid.</sup>

## TITLE LXVIII.

## FORGERY AND COUNTERFEITING.

4 Bl. Com. 247.

**F**ORGERY, or the *crimen falsi*, may be defined, at common law, to be the fraudulent making, or altering of a writing, to the prejudice of another's right.

Cun. Diet. Tit.  
Forg. cites  
1 Hawk. P. C. 183.  
1 Roll. Abr. 28, 29.  
11 Co. 27.

The notion of forgery doth not so much consist in the counterfeiting a man's hand and seal, which may be often done innocently, but in the endeavouring to give an appearance of truth to a mere deceit and falsity ; and either to impose that upon the world, as the solemn act of another, to which he is no way privy, or, at least, to make a man's own act appear to have been done, at a time when it was not done, and, by force of such a falsity, to give it an operation, which in truth and justice it ought not to have.

Cun. Diet.  
Tit. Forg. cites  
3 Inst. 169.  
1 Hawk. P. C. 182.

Hence it is said to be forgery for a man to make a deed of certain lands to J. S. and afterwards to make a deed of the same lands to J. D. of a date prior to that of the deed to J. S. for herein he falsifies the date in order to defraud his own grantee, by making a second conveyance, which, at the time, he had no power to make.

Cun. Diet. Tit.  
Forg. cites  
1 Hawk. P. C. 182.

Also, it is forgery for a man, who is ordered to draw a will for a sick person, to insert legacies in it of his own head.

Cun. Diet. Tit.  
Forg. cites  
3 Inst. 171.  
1 Hawk. P. C. 183.

So where one, finding another's name at the bottom of a letter, at a considerable distance from the other writing, causes the letter to be cut off, and a general release to be written above the name, and takes off the seal, and fixes it under the release, this is also forgery.

Cun. Diet. Tit.  
Forg. cites  
1 Hawk. P. C. 183.

Also, the making any fraudulent alteration of a true deed, in a material part, is forgery ; as the making a lease

of the manor of *Dale* appear to be a lease of the manor of *Sale*, by changing the letter D into an S ; or, by making a bond for *five hundred pounds*, expressed in figures, seem to have been made for *five thousand*, adding a new cypher. But in 3 Inst. 169, Lord Coke seems to think, that a deed, so altered, is more properly to be called a *false* than a *forged* deed ; but, by Serjeant Hawkins, this is forgery ; for a man's hand and seal are falsely made use of to testify his assent to an instrument, which, after such an alteration, is no more his deed than a stranger's.

But as the fraud and intention to deceive, by imposing upon the world that as the act of another, which he never consented to, are the chief ingredients which constitute the offence ; so it hath been held, that he who writes a deed in another's name, and seals it in his presence, and by his command, is not guilty of forgery ; because the law looks upon this as the other's own sealing, as done by his approbation and command.

It seems, that by a bare non-feasance, a man cannot be said to be guilty of forgery ; as if a man, in drawing a will omits a legacy which he is directed to insert ; yet it hath been holden, that if the omission of a bequest to one, cause a material alteration in the limitation of a bequest to another ; as where the omission of a devise of an estate for life to one man, causeth a devise of the same lands to another, to pass a present estate, which otherwise would have passed a remainder only ; he who makes such an omission is guilty of forgery.

But it seems to be no way material, whether a forged instrument be made in such a manner, that if it were in truth such as it is counterfeited for, it would be of validity or not ; and upon this ground it has been adjudged, that the forgery of a protection in the name of A. B. as being a member of parliament, who, in truth, at that time, was not a member, is as much a crime as if he were.

To render a man liable for forgery, the indictment must contain a technical description of forgery, otherwise it will be substantially insufficient.

Cun. Diet. Tit. Forg.  
1 Hawk. P. C. 183.

Cun. Diet. Tit.  
Forg. cites  
Moor, 760.  
Noy, 101.

Cun. Diet. Tit.  
Forg. cites  
1 Hawk. P. C. 184.  
1 Sid. 142.

Commonw. v. Mycall,  
2 Mass. Rep. 136.

*Commonw. v. Stow.*  
1 Mass. Rep. 64.

In an indictment for forgery, alleging an instrument to be "*in the words and figures following*," a strict recital is necessary.

*Commonw. v. Bailey.*  
1 Mass. Rep. 62.

But the number of a bank bill, and the figures in its margin marking its amount, are not parts of the bill, and need not be set out in the indictment.

*Commonw. v. Snell.*  
3 Mass. Rep. 82.

In England, the party whose name is said to be forged, cannot be a witness; for he is considered as interested. because, if the instrument is found by the verdict to be a forgery, it is impounded by the court, so that it cannot again be used as evidence in an action against him. But in this state, the law is, in this respect, different, and the party whose name is said to be forged *may* be a witness; for, although an instrument, found by verdict to be forged, is retained on the files of the court, yet any person interested may have a copy, by which to form his writ, and a *duces tecum* to the clerk to bring the original into court on the trial; and, therefore, the objection to such witness goes only to his credibility.

*Ibid.*

So, on the trial of indictments for forging an instrument, or for knowingly passing it as genuine, no rule of law requires, as indispensable, the production to the jury of the forged instrument. The instrument alleged to be forged, must be so far described in the indictment, that it may appear that forging it is an offence; and this description, as well as the forgery, must be proved by the best evidence the nature of the case will admit. Reading the instrument is better proof of its contents than any parol evidence; and verbal testimony to the signature of a written instrument produced in court, will be more satisfactory than testimony to the signature of an instrument only referred to by the witness. The production, therefore, of the instrument in evidence must not be dispensed with, where it is practicable. But if the instrument cannot be produced, the prosecutor being in no fault, and more especially if it be secreted to protect the offender, the next best evidence will be admissible; and if it satisfy

the jury of the defendant's guilt, it is a legal foundation for a verdict against him. But it may often happen, that when the instrument is not produced, there may be no other evidence, which will *satisfactorily* prove the description, or the forgery of it ; in which case, the defendant must be acquitted.

Having thus briefly noticed this offence, as it stands at common law, we now proceed to consider forgery, by statute, under the following heads.

1. Penalty for forging any paper, (other than a certificate of a public debt, or bank bills ;) or for assisting therein ; or for uttering or publishing the same, knowing it to be counterfeit.

2. Penalty for forging any certificate of a public debt, or bank bill ; or assisting therein ; or for possessing, at any one time, any number of the same, not less than ten, knowing them to be forged.

3. Penalty for uttering or publishing, as true, any forged certificate of a public debt, or bank bill ; or for repeating such offence.

4. Penalty for bring into this state, or having in possession within this state, any forged bank bill, with intent to pass the same, and knowing the same to be forged.

5. Penalty for making or mending any tool, paper, &c. to be used in forging any bank bill, &c. ; and for being possessed of the same with an illegal intent.

6. Penalty for counterfeiting any gold or silver coin, or for assisting therein ; or for possessing, at any one time, any number of the same, not less than ten, knowing the same to be counterfeit, &c.

7. Penalty for bringing into this state any counterfeit coin, or for possessing the same ; or for uttering or publishing the same ; knowing the same to be counterfeit, &c.

8. Penalty for making or mending, or being possessed of any tool, &c. to be used in counterfeiting.

9. Of rewards to prosecutors of this offence.

1. Penalty for forging any paper, (other than a certificate of a public debt, or bank bills;) or for assisting therein; or for uttering or publishing the same, knowing it to be counterfeit.

Stat. 1804, c. 130, s. 1.

To assist.

Scienter.

Intent.

Penalty.

By statute it is enacted, that if any person shall falsely make, alter, forge or counterfeit, or shall procure to be falsely made, altered, forged or counterfeited, or shall willingly aid or assist in falsely making, altering, forging or counterfeiting any public record, any certificate or attestation of a justice of the peace, public register, notary public, clerk of any court, town clerk, or other public officer, in any matter wherein such their certificate or attestation is receivable and may be taken as a legal proof; any charter, deed, will, testament, bond or writing obligatory, letter of attorney, policy of insurance or bill of exchange; any promissory note, order, acquittance or discharge, for or upon the payment of money or delivery of goods; or any acceptance of a bill of exchange or any indorsement or assignment of a bill of exchange or promissory note, for the payment of money; any accountable receipt for money or goods; or for any note, bill or security for money or goods; or any lottery ticket in any lottery legally authorized and licensed within this commonwealth; or shall utter or publish as true, any such false, altered, forged or counterfeited record, certificate or attestation, charter, deed, will, testament, bond, or writing obligatory, letter of attorney, policy of insurance, bill of exchange, promissory note, acceptance, indorsement, assignment, order, acquittance, discharge, accountable receipt, or lottery ticket, knowing the same to be false, altered, forged or counterfeit, with intent to injure or defraud any person, or any body politic or corporate; then every person so offending in either of the particulars aforesaid, who shall be thereof duly convicted in the supreme judicial court, shall be punished by solitary imprisonment, for a term not exceeding six months,

and by confinement afterwards, to hard labour, for a term not less than two years, and not exceeding ten years.

II. Penalty for forging any certificate of a public debt ; or bank bill ; or assisting therein ; or for possessing, at any one time, any number of the same, not less than ten ; knowing them to be forged.

By the same statute it is enacted, that if any person shall falsely make, alter, forge or counterfeit, or shall procure to be falsely made, altered, forged or counterfeited, or shall willingly aid or assist in falsely making, altering, forging or counterfeiting, any note, certificate, or other bill of credit, which hath been or may be issued by the treasurer or other commissioner or commissioners duly authorized, for any debt of this commonwealth ; or any bank bill or promissory note payable to the bearer, signed in behalf of any company or corporation, by law licensed and authorized as a bank within this commonwealth, or payable and demandable therein, at the office of any banking company incorporated by any law of the United States ; or if any person, having knowledge of such false making, altering, forging and counterfeiting, shall willingly aid or assist in altering or rendering current as true, any such false, altered, forged or counterfeit notes, certificates, bills of credit, bank bills, or notes, and for that purpose shall possess, at any one time, any number, not less than ten, of such similar false, altered, forged or counterfeit notes, certificates, or bills of credit, bank bills or notes, knowing the same to be false, altered, forged or counterfeit, as aforesaid, with intent to utter or pass the same, and thereby to injure or defraud this commonwealth, any body politic or corporate, or any person or persons ; then every person so offending in either of the particulars aforesaid, who shall be thereof duly convicted in the supreme judicial court, shall be punished by solitary imprisonment for a term not exceeding one

*Ibid.* s. 2.

The possession of any number not less than ten.

Scienter.

Intent.

Punishment.

# FORGERY AND COUNTERFEITING.

year, and by confinement afterwards to hard labour, for and during his or her life.(1)

III. Penalty for uttering or publishing, as true, any forged certificate of a public debt; or bank bill; or for repeating such offence.

*Ibid.* s. 3.

Scienter.

Intent.

Punishment for repeating the offence.

By the same statute, if any person shall utter or tender in payment as true, any such false, altered, forged or counterfeit note, certificate, or bill of any debt of this commonwealth, bank bill, or promissory note, payable to the bearer, by any bank as aforesaid, knowing the same to be false, altered, forged or counterfeit, with intent to injure or defraud this commonwealth, any body politic or corporate, or any person or persons; every person so offending, and who shall be duly convicted thereof in the supreme judicial court, shall be punished by solitary imprisonment for a term not exceeding thirty days; and by confinement afterwards to hard labour, for a term not exceeding three years; or by a fine not exceeding *one thousand dollars*, and by binding to the good behaviour for two years, at the discretion of the justices of the said court before whom the conviction may be. And if, after any such conviction, the same person shall be guilty a second time of the like offence, and shall be duly convicted thereof in the supreme judicial court; or if in the supreme judicial court at the same term thereof, any person shall be duly charged and convicted of the said offence in three several instances, then such person may be adjudged to be a common utterer of counterfeit bills, and shall be punished by solitary imprisonment for a term not exceeding one year, and by confinement afterwards to hard labour for a term not less than two years, and not exceeding ten years.

(1) The possession *in this state*, of ten counterfeit bank bills, with the intent to pass them in *another state*, is an offence within this act. *Commonwealth v. Cone*, 2 Mass. Rep. 132.

IV. Penalty for bringing into this state, or having in possession within this state, any forged bank bill, with intent to pass the same, and knowing the same to be forged.

By the same statute, if any person shall bring into, or shall have in his possession within this state, any false, forged, and counterfeit bill or bills, note or notes, in the similitude of the bills or notes payable to the bearer thereof, issued by or for any bank or banking company, which is or shall be established within this state, or in any other part of the United States, for the purpose of rendering the same current as true, or with intent to pass the same, knowing the same to be false, forged, and counterfeit; every such offender, upon due conviction thereof before the supreme judicial court, shall be punished by solitary imprisonment, for such term, not exceeding three months; and by confinement afterwards to hard labour, for such term, not exceeding three years; or by a fine, not exceeding *one thousand dollars*, and imprisonment in the common gaol, not exceeding one year; as the justices of the said court, before whom the conviction may be, shall sentence and order, according to the aggravation of the offence.(2)

*Ibid.* s. 4.

Intent.

Scienter.

Punishment.

V. Penalty for making or mending any tool, paper, &c. to be used in forging any bank bill, &c.; and for being possessed of the same with an illegal intent.

By the same statute, if any person shall engrave, form, make, or mend, or shall begin to engrave, form, make, or mend any plate or plates, paper, rolling-press, or other tool, instrument or material, devised, adapted and designed for the stamping, forging and making any counterfeit certificates, bills, or notes, which have been or shall

*Ibid.* s. 5.

To forge.

(2) The possession of forged bills purporting to be the bills of the bank of A. no such bank in fact existing; with intent to pass them as genuine bills, is not an offence within this act. *Commonwealth v. Morse*, 2 Mass. Rep. 138.

## FORGERY AND COUNTERFEITING.

be issued as aforesaid, by or for any debt of this commonwealth, or by or for any bank or banking company, which is or shall be established in this state, or in any other part of the United States ; or shall have in his possession any such plate or plates, engraven in any part, or any paper, rolling-press, or other tool, instrument or material, devised, adapted and designed as aforesaid, with the intent to use and employ the same, or to cause or permit the same to be used and employed, in forging and making any such false and counterfeit certificates, bills or notes, every person so offending, who shall be thereof duly convicted before the supreme judicial court, shall be punished by solitary imprisonment for such term, not exceeding three months, and by confinement afterwards to hard labour, for such term, not exceeding three years ; or by fine, not exceeding *five hundred dollars* ; and by imprisonment in the common gaol, for such term, not exceeding one year, as the justices of the said court, before whom the conviction may be, shall sentence and order, according to the aggravation of the offence. (3)

To have in possession.

Intent.

Punishment.

VI. Penalty for counterfeiting any gold or silver coin ; or for assisting therein ; or for possessing at any one time, any number of the same, not less than ten, knowing the same to be counterfeit, &c.

Ibid. s. 6.

To forge—to aid.—

To assist in passing.

By the same statute, if any person shall forge or counterfeit, or shall procure to be forged or counterfeited, or shall willingly aid or assist in forging or counterfeiting any gold or silver coin, current within this commonwealth, by the laws or usages thereof, or if any person, knowing of such forging and counterfeiting, shall willingly aid or assist in passing and rendering current as true, any such forged or counterfeit coin, and for that purpose shall, at any one time, possess any number, not

(3) The possession of materials devised, adapted and designed for counterfeiting bank notes, without an *intent* to use them in counterfeiting, is not an offence within this act. Commonwealth v. Morse, 2 Mass. Rep. 128.

less than ten, of similar pieces of false money or coin, forged and counterfeited to the similitude of the gold or silver money or coin current as aforesaid, with intent to utter the same as true, knowing the same to be false, forged and counterfeit, every person so offending in either of the particulars aforesaid, who shall be duly convicted thereof in the supreme judicial court, shall be punished by solitary imprisonment, for a term not exceeding one year, and by confinement afterwards to hard labour for and during his or her life.

To possess any number, not less than ten.

Intent.

Scienter

Punishment.

VII. Penalty for bringing into this state any counterfeit coin ; or for possessing the same ; or for uttering or publishing the same ; knowing the same to be counterfeit, &c.

By the same statute, if any person shall bring into this state, or shall possess within the same, any number of similar pieces of false money or coin, forged and counterfeited, knowing the same to be forged, false and counterfeit, with intent to utter and pass the same as true ; or if any person shall utter, pass or tender in payment, as true, any false money or coin, knowing the same to be false, being counterfeit, in the similitude of any gold or silver money, or coin, current by law or usage within this commonwealth, with intent to defraud any person or persons ; every person so offending, who shall be duly convicted thereof in the supreme judicial court, shall be punished by solitary imprisonment for a term, not exceeding three months ; and by confinement afterwards, to hard labour, for a term not exceeding three years ; or by a fine, not exceeding *one thousand dollars*, and by binding to the good behaviour for two years. And if, after one conviction as aforesaid, the same person shall be guilty a second time of the like offence, and shall be duly convicted thereof ; or, if any person, before the supreme judicial court, at the same term thereof, shall be charged and convicted of the said offence, in three several instances ; then such person shall be adjudged to be a common utterer of coun-

Ibid. s. 7.

Bringing into the state.

Passing.

Punishment

After one conviction.

TITLE LIX.

FORNICATION.

**F**ORNICATION is the act of incontinency between *single* persons; for if either party be married, it is adultery.

Can. Dict.

1. Penalty for committing fornication.

2. Of the manner in which a guilty woman may avoid a prosecution for this offence.

I. Penalty for committing fornication.

Stat. 1785, c. 66, s. 1.

Fine, in the case of the man.

Punishment in case of neglect to pay the fine.

Fine, in the case of the woman.

Punishment in case of neglect to pay the fine.

For the first offence.

For each offence after the first.

By statute it is enacted, that if any man commit fornication with any single woman, upon due conviction thereof, he shall be fined, to the use of the county where the crime may be committed, not exceeding the sum of *five pounds*, nor less than *thirty shillings*; and if he declare himself unable, or shall neglect, for the space of twenty-four hours after passing the sentence, to pay the fine and costs, then he shall be whipped, not exceeding ten stripes at the discretion of the justices of the sessions, before whom the matter shall be tried; and the woman so offending, upon due conviction thereof, shall be fined to the use of the county where the crime may be committed, not exceeding the sum of *three pounds*, nor less than *six shillings*; and if she shall declare herself unable, or shall neglect, for the space of twenty-four hours, to pay the fine and cost, then, for the first offence, she shall be committed to prison, or to the house of correction, there to remain not more than ten days, nor less than twenty-four hours; and for each offence after the first, she shall pay a fine, not exceeding *six pounds*, nor less than *twelve shillings*, and if she shall declare herself unable, or shall neglect, for the space of twenty-four hours, to pay the fine and costs, then she shall be committed to prison, or to

the house of correction, there to remain not more than thirty days, nor less than forty-eight hours.

II. Of the manner in which a guilty woman may avoid a prosecution for this offence.

The same statute has further provided, that 'if any woman, guilty of the crime aforesaid, shall appear before any justice of the peace within the county where such offence may be committed, and confess herself to be guilty as aforesaid, and offer to pay into the hands of the said justice, for the first offence, the sum of *vix shillings*, and for any offence after the first, the sum of *twelve shillings*, it shall be the duty of such justice to receive said fine, or to bind her over to the next court of general sessions of the peace, to be holden within and for said county, at his discretion; and a certificate of the payment of the said fine, signed by the same justice, and filed in the clerk's office of the court of general sessions of the peace, shall be a full bar to any process against her for the same offence, unless such process be commenced previous to the filing of the said certificate in the clerk's office as aforesaid.

TITLE LXX.

GAMING.

1. **O**f contracts that are void, by reason of a gaming consideration.

2. Of the liability of the winner to an action by the loser; and the time, within which such action must be brought.

3. Of the evidence by which such action may be sustained.

4. Of the liability of the winner to an indictment.

5. The penalty incurred by an innholder, or retailer of spirituous liquors, who allows gaming in his house.

6. Penalty for gaming at a house of entertainment; or at the house of a retailer.

7. Penalty for keeping a billiard-table at a private house; and for gaming, or allowing gaming in such house.

I. Of contracts that are void, by reason of a gaming consideration.

1785, c. 58, s. 1.

By statute it is enacted, that all notes, bills, bonds, judgments, mortgages, or other securities or conveyances whatsoever, given, granted, drawn, entered into, or executed by any person or persons whatsoever, where the whole, or any part of the consideration of such conveyances or securities, shall be for any money or other valuable thing whatsoever, won by gaming or playing at cards, dice, or any other game or games whatsoever, or by betting on the side or hands of any person gaming, or for the reimbursing, or repaying any money knowingly lent, or advanced for any gaming or betting, or lent and advanced at the time and place of such play, to any person or persons, so gaming or betting, or that shall, during such play, so play or bet, shall be void and of no effect ;

and that where such mortgages, securities, or other conveyances shall be of lands, tenements or hereditaments, or shall be such as incumber or affect the same ; such mortgages, securities, or other conveyance, shall enure, and be to the sole use and benefit of such person or persons, as should, or might have, or be entitled to such lands, tenements, or hereditaments, in case the said grantor or grantors thereof, or the person or persons so incumbering the same, had been naturally dead ; and that all grants or conveyances to be made for the preventing of such lands, tenements or hereditaments from coming to, or devolving upon such person or persons, thereby intended to enjoy the same as aforesaid, shall be deemed fraudulent, void, and of no effect or purpose whatever.

II. Of the liability of the winner to an action by the loser ; and the time, within which such action must be brought.

The same statute has further enacted, that any person or persons, who shall at any time, or sitting, by playing at cards, dice, or any other game or games whatsoever, or by betting on the sides or hands of such as do game, lose to any one or more person or persons, so playing or betting, any sum or sums of money, or any other valuable thing whatsoever, and shall pay or deliver the same, or any part thereof, the person or persons so losing, and paying or delivering the same, shall be at liberty to sue for, and recover, the money or goods so lost and paid or delivered, or any part thereof, or damages, to the full value of the same, from the respective winner or winners thereof, with costs of suit, by action to be commenced within three months next after the losing, paying, or delivering the same ; in which it shall be sufficient for the plaintiff to allege, in an action of assumpsit, that the defendant had received to the plaintiff's use, the money so lost and paid ; and in an action of trover for the goods so lost and delivered, that they came to the hands of the defendant ;

*Ibid.* s. 2.

Action given to the loser.

Time of bringing the action.

Form of the action.

without mentioning in the declaration the particular manner and occasion of the goods or moneys being lost.

*Ibid.*

On neglect of the loser to bring the action within the time limited; such action may be brought by any third person.

And in case the person or persons who shall lose such money, or other thing as aforesaid, shall not within the time aforesaid, really and truly, without cover or collusion, sue and with effect prosecute for the money or other thing so by him or them lost and paid or delivered as aforesaid, it shall and may be lawful to and for any person or persons to sue for and recover treble the value of the money, goods or chattels, with full costs of suit, by action of debt, against such winner or winners as aforesaid, one moiety thereof to the use of the person or persons that will sue for the same, and the other moiety to the use of the poor of the town where the offence shall be committed.

III. Of the evidence by which such action may be sustained.

*Ibid.* s. 4.

Plaintiff admitted to his oath in certain cases.

The same statute has further enacted, that in suits, brought by the person losing money, goods or chattels, against the person winning the same, when it shall appear from the declaration, that the goods, said to be lost, came to the hands of the defendant, by gaming, or the money he had received was by gaming, then, and in such case, if the plaintiff shall offer to make oath, and if required by the court where the trial is, shall actually swear to the losing the money, goods or chattels by gaming with the defendant, at the time and place alleged, judgment shall be rendered for the plaintiff to recover damage to the amount of the goods or money the defendant has received of the plaintiff by gaming, with costs of suit; unless the defendant will swear that he did not receive of the plaintiff the money, goods or chattels for which he is sued, or any part of them by gaming. And when the defendant discharges himself on oath as aforesaid, he shall recover of the plaintiff his reasonable costs. *Provided nevertheless*, that nothing in this act shall be so construed as to prevent the supporting and proving any

Unless the defendant will take a contrary oath.

Plaintiff may support his declaration by the usual evidence.

declarations on the aforesaid actions, in the same manner as other declarations are proved, but it shall be considered as optional with the plaintiff, either to proceed in proving his declaration in the way specially provided in this act, or in the same way other declarations are proved; any thing herein to the contrary notwithstanding.

#### IV. Of the liability of the winner to an indictment.

Any person who shall be convicted, on an indictment <sup>1736, c. 68, s. 3.</sup> of the grand jury, before the court of general sessions of the peace, or the supreme judicial court, of winning, at any one time, or sitting, of any person or persons, by gaming or betting as aforesaid, in money, goods or chattels, to the value of *twenty shillings*, or upwards, and of receiving the same, or security therefor, shall, besides forfeiting double the amount or value of the money, goods or chattels so won and received, to the poor of the town where the offence is committed, be adjudged incapable of holding, keeping or sustaining, directly or indirectly, any office of honour or profit in this commonwealth, for the term of twelve months from the time of such conviction: *Provided*, such indictment be found within eighteen months next after the offence committed.

V. The penalty incurred by an innholder, or retailer of spirituous liquors, who allows gaming in his house.

By statute it is enacted, that no taverner, innholder, or victualler, shall have or keep in or about their houses, <sup>1736, c. 68, s. 5.</sup> yards, gardens, or dependencies, any dice, cards, bowls, billiards, quoits, or any other implements used in gaming; nor shall suffer any person or persons resorting unto any of their houses, to use or exercise any of the said games, or any other unlawful game or sport within their said houses, or any of the dependencies as aforesaid, or places to them belonging, on pain of forfeiting the sum of *forty shillings* for every such offence, upon due conviction thereof, one half thereof to the informer,

the other half to the county, where such offence is committed.

1798, c. 20, s. 1.

Billiards prohibited.

It is enacted by a subsequent statute, that no innholder, tavern-keeper, victualler, or person licensed as a retailer of spirituous liquors, shall keep, or suffer to be kept, any table for the purpose of playing at billiards, in any house, yard, garden, or other appendages to him or her belonging, or by him or her occupied or improved. And if any innholder, tavern-keeper, victualler, or retailer of spirituous liquors, licensed as aforesaid, shall keep, or suffer to be kept, in any house, building, yard, garden, or other appendages to him or her belonging, or by him or her occupied or improved, any such table for the purpose of playing at billiards, or shall suffer, or wittingly and willingly allow any person to play therein at billiards, cards, dice, or any other unlawful game, he or she, so offending, upon conviction thereof, on an indictment of the grand jury before the court of general sessions of the peace, or the supreme judicial court, shall, for each and every such offence, forfeit and pay the sum of *fifty dollars*, to the use of the town where such offence shall be committed, and shall be deprived of his or her license for the remainder of the year, and shall not obtain a renewal thereof, for the space of three years next ensuing.

Forfeiture.

VI. Penalty for gaming at a house of entertainment, or at the house of a retailer.

1788, c. 58, s. 5.

By statute it is enacted, that if any person shall play at cards, dice, or billiards, or with any other implements used in gaming, in any tavern or house of entertainment, or place licensed for retailing spirituous liquors, or in any of the out-houses, yards, gardens, or appendages of the same, or shall, in any of the houses, or licensed places aforesaid, expose to view any of the implements aforesaid, or shall be seen sitting at any table therein with any of the said implements before him, and shall be convicted thereof before any justice of the peace, or any court

of general sessions of the peace, on the presentment of a grand jury, the person so offending shall forfeit and pay a sum not less than *five*, nor more than *sixty shillings*, to the use of the poor of the town, where the offence shall be committed. Also, by statute 1798, c. 20, s. 2, to play at billiards, subjects the offender to a fine of *six dollars*, to be recovered by any person, by action or complaint before a justice of the peace.

VII. Penalty for keeping a billiard-table at a private house ; or for gaming, or allowing gaming in such house.

By statute it is enacted, that if any person, not licensed 1798, c. 20, s. 2. as an innholder, tavern-keeper, victualler, or retailer of spirituous liquors, shall keep or suffer to be kept, in any Private billiard-tables etc. prohibited. house, building, yard, garden, or other appendages thereof, by him or her actually occupied or improved, any tables for the purpose of playing at billiards for hire, gain or reward, or shall, for hire, gain or reward, allow and suffer persons to resort to the same for the purpose of playing at billiards, cards or dice, or at any other unlawful game, such person so offending, on conviction thereof, on an indictment of the grand jury, before the sessions, or the supreme judicial court, shall, for each and every such offence, forfeit and pay the sum of *fifty dollars* Penalty. to the use of the town where the offence shall be committed, and further shall be obliged to recognise with sufficient surety or sureties, in a reasonable sum for his or her good behaviour, and particularly that he or she will not be guilty of a breach of this act for the space of three years next ensuing.

The same statute has further enacted, that if any person shall play at billiards, at any table kept or made use of for the purpose aforesaid, he shall, on conviction thereof, forfeit and pay a fine of *six dollars* for each and every such offence, to be recovered by action or complaint before any justice of the peace, in and for the county, where the offence shall be committed, to the use of him or them, who may prosecute or sue for the same. Ibid. s. 3. Penalty for playing.

TITLE LXXI.

GAOL AND GAOLER.

1. **O**f the erection, custody and superintendence of gaols.
2. Of the duty of gaolers in reference to a callendar of prisoners.
3. Of their duty in reference to prisoners.

I. Of the erection, custody and superintendence of gaols.

Stat. 1784, c. 41, s. 1.

In what places gaols are to be erected.

By statute it is enacted, that the justices of the court of general sessions of the peace shall, from time to time, assess the polls and estates within their several counties, in such sums as may be necessary to erect and keep in repair a good and sufficient gaol in each town where a court, by law, is to be holden ; and to direct and order the building and repairing such gaols, according to their discretion.

Ibid. s. 8.

Apartments to be provided for debtors.

The same statute has further enacted, that in the prisons within the several counties of this state, there shall be provided, by the justices of the court of general sessions of the peace, and at the expense of each county respectively, sufficient and convenient apartments for receiving and lodging prisoners for debt, separate and distinct from felons and other criminals ; and it shall be the duty of the said justices, at the beginning of every quarter sessions, to inquire into the state of the prisons in their respective counties, with respect to the security of such prisons from escape, the condition and accommodation of the prisoners, and shall, from time to time, take such measures as may best tend to secure them from escape, sickness, and infection.

The sessions to inquire into the state of the prisons, etc.

The price of chamber-room in prisons, for debtors, is to be set and established, once in every year, by the court of sessions, and not to exceed *two shillings* a week.

*Ibid.* s. 9.

Price of chamber-room.

It belongs to the court of general sessions of the peace to fix and determine the boundaries of the gaol-yards, to the several gaols appertaining in their several counties. (1)

*Ibid.*

Boundaries of the gaol-yards.

The sheriff of each county shall have the custody, rule and charge of the gaol or gaols therein, and of all prisoners within such gaol or gaols, and shall keep the same himself personally, or by his deputy, for whom he shall be answerable.

Stat. 1793, c. 44, s. 1.

Whenever any dispute about the price of articles, provided by a prison-keeper for a prisoner, while in prison under his custody, shall arise, the sessions for the county in which such gaol stands, are authorized to determine all such disputes.

Stat. 1794, c. 41, s. 16.

Price of articles furnished by the gaoler.

## II. Of the duty of gaolers in reference to a calendar of prisoners.

By statute it is enacted, that the sheriffs of the respective counties shall keep a true and exact calendar or register of all prisoners committed to any prison under his care, and that the same shall be kept in a large bound book, provided and kept for that only purpose; and in the same book shall be distinctly and fairly registered, the names of all prisoners who shall, from time to time, be committed to prison, with their names, places of abode, additions, the time of their commitment, for what cause, and by what authority committed; and of such as are committed for criminal offences, a description of their persons; and also from time to time, as any prisoner shall be liberated, the sheriff shall also register in the same book, the name and description of the person as aforesaid, the time when, and the authority by which such liberation took place; and if any prisoner escapes, the

*Ibid.* s. 5.

Sheriffs to keep an exact calendar of prisoners.

(1) See Title ESCAPE.

time and manner of the escape shall be noted in the said book.

*Ibid.* s. 6.

List of prisoners to be returned at certain courts.

The same statute has further enacted, that every gaoler or prison-keeper, at the opening of the supreme judicial court or the court of general sessions of the peace, within the county where he keeps the gaol, shall return a list of prisoners in his custody, therein certifying the cause for which, and the persons by whom they were committed, and the names of all persons who shall be committed during the sitting of either of the said courts, with the cause of their commitment, that the justices of the said court respectively may take cognizance thereof, and as well for the commonwealth as the parties, may proceed to make deliverance of such prisoners according to law, for the crimes proper to the jurisdiction of the same courts respectively ; and also shall have the said calendar or register of prisoners ready to be inspected by the said courts ; and if any gaoler shall make default herein, he shall be fined at the discretion of the court.

### III. Of their duty in reference to prisoners.

Stat. 1787, c. 23, s. 1.  
and 1790, c. 42, s. 1.

Prisoners for debt.

When a person committed on execution for a private debt, or on a warrant for collection of a tax, makes complaint to a gaoler, that he has not estate sufficient to support himself in prison, it is the duty of such gaoler to apply to a justice of the peace within the county in which such prison is, for the usual notification to the creditor or assessors, that it is such prisoner's desire to take the benefit of the poor debtor's oath.

Stat. 1804, c. 143,  
s. 16.

Prisoners convicted of larceny.

By statute it is enacted, that when a person convicted of larceny, be unable to make restitution or pay the value of the property stolen, to the owner thereof, and such convict be sentenced to make satisfaction to such owner by service ; in such case, no such convict shall be held in gaol for such satisfaction of the amount or value as aforesaid, for a longer term than thirty days, unless such owner shall give security to the keeper of the gaol, to

satisfy the charge of keeping such prisoner from and after that time, according to the rate allowed for keeping prisoners in the same gaol ; and if such owner shall refuse or neglect so to do, and shall not take or dispose of such prisoner, the keeper shall no longer keep such prisoner for that purpose, but may set him or her at liberty, after the expiration of the term of imprisonment, if any, ordered by the sentence, and after the payment of the costs of court, and his own charges of imprisonment ; and if he or she be unable to pay the same, upon application by the keeper of the gaol to any two justices of the *quorum* within the same county, they are empowered to determine the sum to be paid, and to order such prisoner to make satisfaction by service, for such reasonable time, not exceeding two years, as they may assign, for which time the keeper may thereupon dispose of such prisoner in service, to any citizen of the *United States*: And if he or she cannot be so disposed of, after being confined three months, for costs, or fine and costs only, the justices of the court of common pleas, within and for the same county may, at their discretion, order such prisoner to be discharged, upon such security as they may judge proper.

TITLE LXXII.

GRANTS TO PIOUS AND CHARITABLE  
USES.

Stat. 1785, c. 51, s. 2.

**T**HE income of a grant to pious and charitable uses, made to an ecclesiastical corporation, must not exceed the sum of *one thousand dollars* per annum.

Stat. 1784, s. 2.  
See 3 Vol. Laws,  
Thomas's Ed.  
Append. page 212.

So if such donation be by deed, the gift will be void, unless the deed be recorded in the register's office three calendar months before the death of the donor.

*Ibid.*

If the donation be by will, such donation must be made before the donor's last sickness, or at least three months before his death.

Stat. 1785, c. 51, s. 1.

By statute it is enacted, that the deacons of all the several protestant churches, not being episcopal churches, and the church-wardens of the several episcopal churches are, and shall be deemed so far bodies corporate, as to take, in succession, all grants and donations, whether real or personal, made either to their several churches, the poor of their churches, or to them and their successors, and to sue and defend in all actions touching the same.

*Ibid.*

And wherever the ministers, elders or vestry, shall, in such original grants or donations, have been joined with such deacons or church-wardens as donees, or grantees in succession; in such cases, such officers and their successors, together with the deacons or church-wardens, shall be deemed the corporation for such purposes as aforesaid.

*Ibid.*

And the minister or ministers of the several protestant churches, of whatever denomination, shall be deemed capable of taking in succession any parsonage land or lands, granted, to the minister and his successors, or to the use of the ministers, and of suing and defending all

actions touching the same; saving, that nothing in this act shall be construed to make void any final judgment of any court of common law or probate; saving also, that no alienation of any lands belonging to churches, made by the deacons, without the consent of the church, or a committee of the church for that purpose appointed, or by church-wardens, without the consent of the vestry, shall be sufficient to pass the same; and no alienation made by ministers, of lands held by them in succession, shall be valid any longer than during such alienors continuing ministers, unless such ministers be ministers of particular towns, districts or precincts, and make such alienation, with their consent respectively; or unless such ministers, so alienating, be ministers of episcopal churches, and the same be done with the consent of the vestry.

And the several churches in this commonwealth, not <sup>being</sup> episcopal churches, are empowered to choose a committee to call the deacons or other church officers to an account, and if need be, commence and prosecute any suits touching the same, and also to advise and assist such deacons in the administration of the affairs aforesaid.

TITLE LXXIII.

GUARDIANS.

1. **G**UARDIANS of minors.

2. Guardians of idiots, lunatics, and distracted persons; and of the children of such idiots, &c.

3. Guardians of idle and dissolute persons.

4. Of the power and duty of guardians.

5. Of their liability and privileges.

I. Guardians of minors.

Stat. 1783, c. 38, s. 1.

The judge of probate in each county respectively is empowered, to allow of guardians that shall be chosen by minors of fourteen years of age, and to appoint guardians for such as shall be within or under that age, taking sufficient security of all such guardians for the faithful discharge of their trust, and to account either to the judge or minor when such minor shall arrive to the age of twenty-one years of age, or at such other time as the judge, upon complaint to him made, shall direct.

Thid.

And when any minor above the age of fourteen years, shall be cited by the judge of probate to choose a guardian, and such minor shall refuse or neglect to appear, or, when appearing, shall refuse to choose a guardian, or any guardian chosen by such minor shall be unable to give sufficient security, or shall refuse the trust; or when any minor above the age of fourteen years shall be without this government; in every such case the judge of probate shall have the same power to appoint a guardian, as though such minor were under the age of fourteen years.

Thid. s. 2.

When a minor above the age of fourteen years, living more than ten miles distant from the judge of probate's

dwelling-house, shall choose a guardian, such minor may have that choice certified to the judge by any justice of the peace in the same county, or by the town clerk, if no justice shall dwell in such town ; which choice, so certified, shall be as good and valid as if done in the said judge's presence.

II. Guardians of idiots, lunatics, and distracted persons ; and of the children of such idiots, &c.

By statute it is enacted, that it shall be in the power of the judges for the probate of wills, within their respective counties, from time to time, (upon request made by the friends or relations of any idiot, *non-compos*, or lunatic person, or by the overseers of the poor in such town where such idiot, *non-compos*, or lunatic person lives, or is an inhabitant,) to direct the selectmen of such town to make inquisition thereinto ; and if the person said to be an idiot, lunatic, or distracted person, shall be adjudged by the selectmen of the town, (or the major part of them,) where such person resides, to be incapable to take care of him or herself, and they shall certify the same under their hands, to the judge, the said judge of probate shall be empowered to assign some suitable person or persons to be guardian or guardians to such idiot, lunatic, *non-compos*, or distracted person, directing and empowering such guardian or guardians to take care of the person and estate, both real and personal, of such person, and to make a true and perfect inventory of the said estate, to be returned into, and filed in, the probate office in such county. Ibid. s. 3.

The guardian or guardians appointed as aforesaid, shall give bond to the judge of probate for the time being, in a reasonable sum, with sufficient sureties, for the faithful discharge of the trust reposed in them, and more especially for the rendering a just and true account of their guardianship, when and so often as they shall be thereunto required. Ibid. s. 6.

*Ibid.* s. 7.

The judges of probate in their respective counties may also, as occasion may require, appoint guardians for the children of lunatics, idiots, *non-compos*, or distracted persons, in the same way and manner as though their parents were naturally dead.

### III. Guardians of idle and dissolute persons.

*Ibid.* s. 8.

By statute it is enacted, that when any person by excessive drinking, gaming, idleness, or debauchery of any kind, shall so spend, waste, or lessen his or her estate, as thereby to expose himself or herself, or his or her family, or any of them, to want or suffering circumstances; or shall, by thus spending, wasting, or lessening his or her estate, endanger or expose the town to which he or she belongs, in the judgment of the selectmen thereof, to a charge or expense, for the maintenance or support of him or her, or his or her family, or any of them, such selectmen, or the major part of them, shall, in such case, lodge a complaint with the judge of probate for the county to which the person spending, wasting, or lessening his estate as aforesaid, doth belong; and if it shall appear to the said judge of probate, that the person complained of, comes within the description of this act, and has had due notice of the complaint exhibited against him or her, as the case may be, then, and in that case, the said judge of probate shall appoint the said selectmen, or the major part of them, or some suitable and discrete person or persons, guardian or guardians to such person.

*Ibid.*

And no sale or bargain of any real or personal estate, made by such person or persons, after the appointment of guardianship, as aforesaid, shall be held valid in law.

*Ibid.*

And the guardian or guardians who may be thus appointed, shall, in discharging the duties of their appointment, pursue the same method, and be under similar obligations for a faithful discharge of their trust, as guardians appointed for idiots, lunatics, or for persons *non-compos mentis*.

IV. Of the power and duty of guardians.

By statute it is enacted, that the guardian or guardians of an idiot, *non-compos*, lunatic, or distracted person, shall improve frugally and without waste and destruction the estate of his ward, and apply the annual income and profits thereof, for the comfortable maintenance and support of the said idiot, lunatic, *non-compos*, or distracted person, and also of his or her household or family, (if any such there be,) and the said guardian or guardians are empowered to settle accounts, receive, (and if need be,) to sue and recover all just debts due to the said idiot, lunatic, *non-compos*, or distracted person, from any person or persons, whomsoever, and to manage, improve, or divide the real estate in as full and ample a manner as the said idiot, lunatic, *non-compos*, or distracted person might or could, were they restored to the full use of their rational faculties; and shall also be subject to the payment of all just debts owing by such person which were contracted before their distraction, out of their personal estate, or, in case that be insufficient, out of their real estate, being first empowered to make sale thereof by the supreme judicial court, in the way and manner executors or administrators are empowered to make sale of the real estates of deceased persons.

*Ibid.* s. 5.

Guardians of idiots, lunatics, *non-compos*, or distracted persons. Improvement and management of the ward's estate.

Recovery and payment of their debts.

Sale of their personal or real estate.

And in case the income or improvement of the personal and real estate of such persons shall not be sufficient to support them, the supreme judicial court may license and authorize the guardians to make sale, of the whole or part of the real estate of such person for that purpose, as occasion may require.

*Ibid.*

How to be supported by their estates.

And in case any such idiot, lunatic, or distracted person shall be restored to the use of his reason, the residue and remainder of the estate, real and personal, shall be returned and delivered to him, or, in case of his death, to his heirs, executors, or administrators; the guardian or guardians having first such a reasonable allowance out of

*Ibid.*

Their death or restoration to reason.

the same, for their charge and trouble, as the judge of probate shall order.

Stat. 1783, c. 32, s. 5.

Friends or guardians of persons *non-compos* may, in certain cases, dispose of the real estates of their wards, and put the proceeds of the sale at interest.

So by statute it is enacted, that when it shall fully appear to the justices of the supreme judicial court aforesaid, by the petition and representation of the friends or guardians of minors interested in the real estate of any deceased testator or intestate, that it would be for the benefit of such minors, or persons *non-compos mentis*, that their interest therein should be disposed of, and the proceeds thereof be put out and secured to them on interest, the said justices, after a full examination on the oath of the petitioner, or otherwise, may authorize some suitable person or persons to sell and convey such estate, or part thereof, by deed or deeds duly acknowledged and recorded in the registry of deeds as aforesaid; provided such person or persons first give bond, with sufficient sureties, to the judge of probate for the county where the said deceased person last dwelt, to observe the rules and directions of law, in the sale of real estates, by executors or administrators, and to account for and make payment of the proceeds of the said sale, agreeable to the rules of law. *Provided*, that the said judge of probate shall certify, that the whole or a part of the said estate is, in his opinion, necessary to be sold, or if part only, what part.

Stat. 1806, c. 102.

Guardians of idle and dissolute persons may sell the real estates of their wards, in certain cases, and under certain restrictions.

So also by statute it is enacted, that the guardian or guardians of any person or persons who have spent, or shall spend or waste their estates, by excessive drinking, gaming, idleness or debauchery, are authorized and enjoined to pay the debts of such person or persons, and to provide for their maintenance and the support of their families, out of their real estate, when their personal estate shall be insufficient; and, for these purposes, may sell so much of the real estates of their wards as shall be necessary therefor, in the way and manner, and under the conditions, restrictions and limitations under which executors and administrators are empowered to sell the

estate of deceased persons ; such guardians first obtaining a license from the supreme judicial court, or from the court of common pleas of the county where the real estate shall be : *Provided, however*, that no such license be granted, unless the person applying for the same, shall produce to the court a certificate, under the hands of the overseers of the poor of the town, in which said idle, gaming person has gained a legal residence, purporting their consent and approbation to the sale of such a proportion of the real estate of such person, as such overseers shall be satisfied is just and equitable, to discharge the *bona fide* debts of such idle person, excluding all debts contracted by gaming.

It is also enacted by statute, that the judges of probate in their respective counties, may, (upon the complaint of any heir, creditor or other person, having lawful right or claims in expectancy, to the estate of any idiot, lunatic, *non-compos*, or distracted person, as well as the guardian or guardians) proceed with any person or persons suspected of concealing, embezzling, or conveying away, any of the money, goods or chattels of such idiot, lunatic, *non-compos* or distracted person, in the same way and manner as is by law prescribed for persons suspected of concealing, embezzling, or conveying away the money, goods or effects of deceased persons.

Stat. 1783, c. 38, s. 4.

How persons suspected of embezzling, etc. the property of a *non compos*, are to be proceeded with.

A father is the natural guardian of his child, but as such merely, he is not entitled to manage the *independent* estate of his child. To entitle him so to do, he must in the manner of other guardians, be appointed by the judge of probate and give bonds for the faithful performance of his trust.

May v. Cakier,  
2 Mass. Rep. 57.

#### V. Of their liability and privileges.

Every judge of probate is authorized by statute, to dismiss any guardian, appointed by himself or his predecessor in that office, whenever it may appear to the

Stat. 1780, c. 46.

Guardians may be dismissed by the judge

of probate, in certain cases.

said judge, that necessity or expediency may require the same, and to appoint some other guardian in his place. *Provided*, that no such guardian shall be dismissed as aforesaid, from his guardianship, before he shall have had notice in writing given him by such judge, fourteen days before the time of hearing, to appear and shew cause why he should not be dismissed.

Stat. 1786, c. 55, s. 2.

The like proceedings and judgments, (so far as they can with propriety take place) are to be had on bonds of guardianship, as on bonds of executors and administrators, when put in suit.

Stat. 1783, c. 38, s. 9.

Guardians are not compellable to plead specially, to any action brought against them in that capacity ; but may, under the general issue, give any special matter in evidence.

TITLE LXXIV.

GUIDE-POSTS.

1. Of the erection of guide-posts.
2. Of the height of the post, and the inscription on the board.
3. Penalty for neglecting to erect such posts.
4. Penalty for injuring or defacing such post or board.

I. Of the erection of guide-posts.

By statute it is enacted, that it shall be the duty of the inhabitants of the several towns and districts within this commonwealth, and also such unincorporated plantations as are assessed in any public tax, to provide, erect and keep in repair such guide-posts upon all public roads, at such places, and in such manner, as is provided in the act. Stat. 1794, c. 63, s. 1.

It is further enacted, that the selectmen of the several towns and districts, and the assessors of all unincorporated plantations, assessed in any public tax, in this commonwealth, are authorized and required, from time to time, to fix and determine upon the corners and angles of all roads in the several towns, districts and plantations aforesaid, at which the guide-posts shall be erected and kept, as in their judgment shall be found necessary and convenient; and shall cause a fair record thereof to be entered and kept amongst the records of the said towns, districts or plantations. Ibid. s. 2.

II. Of the height of the post, and the inscription on the board.

The same statute has further enacted, that the guide-posts to be erected and kept, shall be constructed in man- Ibid. s. 3.

## GUIDE-POSTS.

ner following; there shall be erected at the several corners or angles of the roads aforesaid, at such places as shall be ordered by the selectmen of towns and districts, or assessors of plantations aforesaid, a substantial post, of no less than eight feet in height; upon the upper end of which shall be placed, a board or boards, upon each of which boards shall be plainly and legibly painted, the name of the next town, with such other noted town or place, as may be judged most expedient, for the direction of travellers, to which each of the roads may lead, together with the distance or number of miles to the same; and also the figure of a hand, with the fore-finger thereof pointing towards the town or place to which the said roads may lead. *Provided nevertheless*, that the inhabitants of the several towns, districts and plantations aforesaid, duly qualified to vote in town or plantation affairs, may, if they judge fit, on or before the first Monday in April annually, agree upon some suitable substitute in the room of said guide-posts, and appoint any proper person or persons to superintend the erecting the same.

## III. Penalty for neglecting to erect such posts.

*Ibid.* s. 4.

By statute it is enacted, that if the inhabitants of any of the towns, districts or plantations aforesaid, shall neglect or refuse to erect and maintain such guide-posts, in such places and in such manner as is provided, the said inhabitants shall forfeit and pay to the use of the commonwealth, *twenty shillings* for every month which they shall so neglect or refuse. And if the selectmen of the several towns and districts, or the assessors of the several plantations aforesaid, shall neglect or refuse to fix and determine upon any places in the towns, districts or plantations aforesaid, at which the guide-posts shall be erected and kept, by the time set and limited, the said selectmen or assessors shall forfeit and pay, to the use of the commonwealth, *twenty shillings* for every month which

they shall so neglect or refuse ; said penalties and forfeitures to be recovered by indictment of the grand jury, in the county where the offence may be committed.

IV. Penalty for injuring or defacing such post or board.

The same statute has further enacted, that if any person shall injure, mar or deface any guide-post or its substitute, <sup>*Ibid. s. 5.*</sup> agreed upon, as aforesaid, or board, which shall be set up, as is provided, and be convicted thereof before any justice of the peace, within this commonwealth, such person, so convicted, shall forfeit and pay a sum, not more than *forty shillings*, nor less than *twenty shillings* ; one half to the complainant, and the other half to the use of the town, district or plantation, in which such guide-post or its substitute, so injured, mared or defaced, was set up, and shall pay all costs of prosecution.

TITLE LXXV.

HABEAS CORPUS.

Stat. 1784, c. 72.

Preamb.

Const. c. 6, art. 7.

Stat. 1784, c. 72, s. 1,  
and 2.

**T**HE writ of *habeas corpus* is a writ of right,<sup>(1)</sup> to which the citizens of this commonwealth are, by the constitution, and the law of the land, at all times entitled, to obtain relief from every wrongful imprisonment, or unlawful restraint of personal liberty.

The constitution declares, that the privilege and benefit of the writ of *habeas corpus*, shall be enjoyed in this commonwealth, in the most free, easy, cheap, expeditious, and ample manner; and shall not be suspended by the legislature, except upon the most urgent and pressing occasions, and for a limited time not exceeding twelve months.

The supreme judicial court has the exclusive power of granting this writ; and it is enacted, that such writ, when awarded by the said court, shall be signed by the clerk, tested by the first justice who is not party thereto, and sealed with the seal thereof; but when awarded by any judge in the vacation, shall only be under the hand and seal of such judge, and shall direct the place to which the complainant shall be brought.

(1) Of the writ of *habeas corpus*, there are various kinds. Such are those, *ad prosequendum*, *testificandum*, *deliberandum*, &c. which issue when it is necessary to remove a prisoner, in order to prosecute or bear testimony in any court, or to be tried in the proper jurisdiction wherein the fact was committed. The writ considered under the present title, is called a *habeas corpus cum causa*, and is the great and efficacious writ in all manner of illegal confinement. It is distinguished by the adjunct, *cum causa*, because the officer is directed to return the *cause* of imprisonment, as well as the body of the prisoner. See 3 Bl. Com. 129, 130.

## HABEAS CORPUS.

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The form of this writ is prescribed by statute; and may be seen in the appendix.

See Append. No. 6.

1. Proceedings by which to acquire this writ.
2. Duty of the officer to whom this writ is directed; and the penalty for his neglect of duty.
3. Of the return of the writ.
4. Proceedings following the return of the writ.

### I. Proceedings by which to acquire this writ.

By statute it is enacted, that any person imprisoned in any common gaol, or otherwise restrained of his personal liberty, by any officer or officers, or any other person or persons, for any cause, or upon any pretence whatever, he, or any person in his behalf may complain, in writing, to the supreme judicial court of this commonwealth, in term-time, in any county, or to any one or more of the judges thereof, in the vacation time of the said court; and upon such complaint, and upon view of the copy of the warrant, (if any there be,) by which such person stands committed, or upon his affidavit certified by a justice of the peace, or on the oath of the person applying on his behalf, or any other credible witness, or upon the affidavit of such witness certified as aforesaid, if he lives more than twenty miles from the court or judge applied to, that a copy of such warrant has been demanded and denied; the said court in term-time, and the said judge in the vacation, are respectively authorized to award a writ of *habeas corpus*, directed to the officer or person imprisoning or restraining the complainant, returnable forthwith to such court or judge, who awarded the same, except the complaint be in favour of persons committed for treason or felony, or for suspicion thereof, or as accessory to the latter before the fact, plainly and specially expressed in the warrant of commitment, or persons convict, or in execution by legal process, criminal or civil, or committed by *meane process* in any civil action for want of reasonable bail, and persons with regard to whom the benefit of

Stat. 1784, c. 72, s. 1.

the said writ shall be suspended by the legislature, agreeable to the constitution. (2)

II. Duty of the officer to whom this writ is directed ; and the penalty for his neglect of duty.

*Ibid.* s. 3.

Officer to return the body within a certain time.

The same statute has further enacted, that when any person shall bring and offer such writ of *habeas corpus*, to the officer or person to whom the same shall be directed, he shall receive the same ; and upon payment or tender of such charges for bringing the complainant from the place of imprisonment, as the court or judge who grants the writ shall order, if the person complaining be confined in a common gaol, or under the custody of an officer, otherwise, without such payment or tender, to the place mentioned in the writ, such officer or person, shall have the body of the complainant before the court or judge awarding the writ, at the place therein mentioned, within three days, if within twenty miles from the place of imprisonment ; if more than twenty, but within one hundred miles, then within ten days ; if above one hundred miles, then within twenty days after the receipt thereof ; and shall then return the same, and certify the true and all the cause or causes of his or her taking and detaining.

*Ibid.* s. 7.

Penalty in case the officer refuses obedience to the writ.

The same statute has further enacted, that if any officer or person, to whom the writ of *habeas corpus*, shall be directed, shall refuse to receive the same, or, after receipt thereof, shall refuse or neglect to yield such obe-

(2) By section second, of the act, there is a proviso, that nothing contained in the act, shall be construed to hinder or restrain the supreme judicial court, in term-time, or any one or more judges thereof, in the vacation, from bailing any person, wherever, and for whatever offence committed, at their discretion, whenever the circumstances of the case shall appear to require it ; persons committed by the governor and council, senate, or house of representatives, agreeable to, and for the causes mentioned in the constitution, always excepted.

dience thereto, as this act requires, (the complainant performing the conditions required,) unless prevented by the sickness of the prisoner, or other necessity, he, for such refusal or neglect, in each and every particular, shall forfeit, to the party grieved, the sum of *one hundred pounds*; and for any false return to such writ, shall be further liable to the action of the party.

The court or judge respectively, may further punish every disobedience to such writ, as for a contempt, and compel obedience thereto, by process of attachment.

### III. Of the return of the writ.

The same statute has further enacted, that if, after awarding such writ by any judge of the said supreme judicial court, in the vacation, but before the return thereof, the said court shall sit in any county, the said writ, with the body of the complainant, and causes of taking and detaining, may be returned, had and certified to the said court, by the judge who awarded the same: but if, after awarding such writ by the said court, in term-time, but before the return thereof, the said court shall rise, or be adjourned, the same, with the body of the complainant, and causes of taking and detaining, shall be returned, had and certified before some judge of the said supreme judicial court. Ibid. s. 4.

### IV. Proceedings following the return of the writ.

The same statute has further enacted, that when any person shall be brought, by writ of *habeas corpus* as aforesaid, before the said court, or any judge thereof, such court or judge shall, within three days after, proceed to examine the said causes; and if committed for an offence or cause bailable by law, they shall bail him by recognizing him with sufficient surety or sureties in a reasonable sum, having regard to his quality and circumstances, and the nature of the offence; and shall certify the recognizance into such court, if committed upon *meane process*. Ibid. s. 5.

## HABEAS CORPUS.

in any civil action for want of bail, and the bail required shall appear excessive, it shall be ascertained what bail is reasonable, and he shall be discharged on giving the same: but if it shall appear that the complainant is imprisoned or restrained without due order of law, or sufficient cause, he shall be discharged from such commitment or restraint.

Ibid. s. 12.

Of persons enlarged  
by *habeas corpus*.

And it is further enacted by the same statute, that no person enlarged by *habeas corpus* shall be again imprisoned or restrained of his liberty for the same cause, unless he shall be indicted therefor, or convicted thereof, or shall neglect to find bail when ordered thereunto by some court of record.

NOTE.—Persons committed by the governor and council, senate, or house of representatives, agreeable to, and for the causes mentioned in the constitution, are expressly excluded from the benefit of this act.

TITLE LXXVI.

HARBOURS.

**W**E have a provincial statute which enacts, that no master or commander of any ship or other vessel, coming from sea into any road, port or harbour, within this province, shall presume to unload, or throw overboard, any ballast or rubbish, into such road, port or harbour, under the penalty of *twenty pounds* : and in the ballasting or unballasting any ship or other vessel, there shall be a canvas or tarpolin, which shall reach from the ballast-port or gunnel, to the lighter or boat ; to prevent any part of the ballast or rubbish falling into such port, road and harbour as aforesaid. Nor shall any such commander or master as aforesaid, take off any sort of ballast from any island, beach or other land, being the property of any town, or of any particular person or persons within this province, without leave first had and obtained from the selectmen of such town, or the major part of them, or from such person or persons as they shall intrust therewithal, or other proprietor ; under the penalty of *forty shillings* ; to be recovered before a justice of the peace.

Stat. 1713.

See 3 Mass. Laws,  
Append. p. 170.  
Thomas's Ed.

*Provided*, That this act shall not extend to the hindering any commander or master of any ship or other vessel, after they are under sail outward bound, who find a necessity of taking in more ballast, to take the same from off any island, beach or other land, as above-mentioned, making satisfaction therefor.

Proviso.

The penalties arising by this act, to be one half thereof for the use of the poor of the town where the offence is committed ; the other half to the use and benefit of the informer. The penalty of *twenty pounds* aforesaid, to be recovered by bill, plaint or information, in any court of record within the respective counties, where the offence shall be committed.

How the forfeitures  
are to be disposed of.

TITLE LXXVII.

**HAWKERS, PEDLARS AND PETTY-  
CHAPMEN.**

1. **PROHIBITION** of hawkers, &c.
2. Persons exempted from the penalties of the act against hawkers, &c.
3. Mode of prosecuting hawkers, &c.
4. Liability of inn-holders who entertain hawkers, &c.

I. Prohibition of hawkers, &c.

1785, c. 2, s. 1.

By statute it is enacted, that every hawker, pedlar, petty-chapman or other person, going from town to town, on foot, or with a horse or horses, or otherwise, carrying to sell, or exposing to sale, any wares, goods or merchandize, within this commonwealth, shall forfeit a sum not exceeding *four pounds*, nor less than *twenty shillings*; also, one quarter part of all such goods, wares or merchandize by him or them exposed to sale, or so conveyed or transported as aforesaid, to him or them who shall prosecute therefor, by information or complaint, before the court of general sessions of the peace, in the same county.

II. Persons exempted from the penalties of the act against hawkers. &c.

*ibid.*

The act contains a proviso, that nothing therein shall prohibit or hinder any person, who is the real worker or maker of any goods or wares, or his servants or agents, from carrying abroad, exposing to sale, or selling any of the said goods or wares of his own making, or other

articles manufactured within this commonwealth, in any fair, market or elsewhere, or from selling any fish, fruits or provisions ; or any tinker, cooper, glazier or mender, or other person, from going about and carrying with him proper materials for mending the things usually made or mended in the exercise of his trade.

Doubts, however, having arisen, whether the above act extended to the hawkers and pedlars of indigo and feathers, the same being the growth and production of the United States, it was therefore provided by a subsequent statute, that any person who shall go from town to town, on foot, or with a horse or horses, or otherwise, carrying to sell, or exposing to sale, any indigo or feathers, shall incur the penalties and forfeitures, and shall and may be prosecuted, convicted and fined, in the way and manner pointed out in the former act. 1799, c. 20, s. 1.

### III. Mode of prosecuting hawkers, &c.

Any justice of the peace, upon complaint to him made of any hawker, pedlar or petty-chapman, may arrest or summon before him, the person or persons complained against, and, order him or them to recognize, with sufficient surety or sureties, to appear and answer the complaint or information that may be exhibited against him or them, before the next court of the sessions of the peace, in the county where the offence is said to be committed ; and for want of sufficient surety, to commit such offender or offenders to the common gaol of the county ; and also to secure and detain all such goods, wares and merchandize until the trial. *Provided*, the complainant will enter into recognizance, with surety, before the same justice, to the supposed offender, in a sufficient sum to pay cost, in case the complainant shall fail of prosecuting or convicting the offender ; and the court of general sessions of the peace may assess cost, upon the trial, for or against the complainant, as the case may require. Stat. 1785, c. 2, s. 1.  
Stat. 1799, c. 20, s. 1.

## IV. Liability of inn-holders who entertain hawkers, &amp;c.

Stat. 1785, c. 2, s. 1.

Stat. 1799, c. 20, s. 1.

The same statute has further enacted, that all taverners, ale-house-keepers, common victuallers or retailers, that shall knowingly entertain any hawker, pedlar or petty-chapman, or other trading person aforesaid, for the space of twelve hours, shall forfeit and pay the sum of *twenty shillings* for every six hours after the first twelve, (unless the departure of such hawker, pedlar or petty-chapman shall be prevented by means of sickness, or any other unavoidable necessity) to him or them who shall prosecute and sue therefor, by action of debt.

TITLE LXXVIII.

HIGHWAYS AND PRIVATE-WAYS.

1. **O**f the laying out of private-ways by selectmen.
2. Of the establishment of private-ways, by the sessions, on refusal of the selectmen.
3. Of the establishment of private-ways, by the sessions, on neglect of the town to allow the same.
4. Of the establishment of highways from town to town.
5. Of highways in unincorporated plantations.
6. Of highways through proprietors' lands, in unincorporated towns, and plantations.
7. Of the time allowed towns, &c. to complete a new highway, and the penalty for their neglect of duty.
8. Of the discontinuance of highways and private-ways.

I. Of the laying out of private-ways by selectmen.

By statute, the selectmen of the several towns, in this government, are empowered, either personally, or by such other person or persons, as they shall appoint, to lay out, within their respective towns, particular and private ways, for the use of such town only ; or for the use of one or more individuals thereof, or proprietors therein. Stat. 1786, c. 67, s. 1.

And if any particular person or persons, who are owners of the land, through which such private roads shall be laid out, be injured thereby, he or they shall receive such recompense, as the party interested and the selectmen shall agree upon, to be paid by the town, or the individual person or persons for whose use the road is laid out, or as shall be ordered by the sessions, upon an inquiry into the same, by a jury to be summoned for Ibid.

that purpose, or by a special committee, if the parties agree thereunto. (1) *Provided always*, that no private-way, laid out by the selectmen, or their order, as aforesaid, shall be established as such, until the same has been reported to the town, at some public meeting of the inhabitants thereof, regularly notified and warned, and by them approved and allowed.

*Commonw. v. Mer-  
rick.  
2 Mass. Rep. 330.*

The laying out a town-way, by the selectmen, must be recorded before it is offered to the town for acceptance.

## II. Of the establishment of private-ways, by the sessions, on refusal of the selectmen.

*Stat. 1786, c. 67, s. 2.*

Furthermore, by statute, if the selectmen shall unreasonably delay or refuse to lay out, any such private-way, as before described, being thereunto requested, in writing, by one or more of the inhabitants or proprietors of land in such town, then the sessions for the same county, at any session thereof within one year, if the request appear to them reasonable, may cause the same private-way to be laid out at the cost of the persons applying, by a committee of three disinterested freeholders; which committee shall estimate the damages occasioned thereby, (if any there be) as well as ascertain the place and course of the said private-way. The damages to be paid by the town, if it be of general benefit, otherwise by the individual or individuals for whose use and benefit the way is laid out.

## III. Of the establishment of private-ways, by the sessions, on neglect of the town to allow the same.

*Ibid. s. 3.*

Furthermore, by statute, when any town shall unreasonably delay or refuse to approve and allow of any private way, laid out by the selectmen thereof, or their order, and put the same on record, any person or persons aggrieved by such delay or refusal, may apply to

(1) For further information on this subject, see title DAMAGES, vol. I. p. 379, 380, 381, 382.

the court of sessions for the same county, within twelve months after such refusal or delay; and the same court, after hearing the town thereon, may accept and approve of the said private-way, as laid out by the selectmen, and direct the same to be recorded in the town book; or they may order the private-way petitioned for, to be laid out by a committee of three disinterested freeholders, to be by them appointed for that purpose, which committee shall be under similar directions and obligations as to locating and estimating the damages occasioned thereby, as by this act is prescribed for a committee of five, in locating or altering a county highway.

The sessions cannot approve a town-way laid out by the selectmen, and refused by the town, without giving previous notice to the town.

*Commonw. v. Sheldon et al.*  
3 Mass. Rep. 188.

IV. Of the establishment of highways from town to town.

Furthermore, by statute, when a new highway, or common road from town to town or place to place, shall be wanting, or where an highway or common road already laid out, stated and established, may or can with greater conveniency, be turned or altered; upon application made to the court of sessions within the same county, and it being determined by them to be of common convenience or necessity (2) to have such new way laid out,

*Stat. 1786, c. 67, s. 4.*

(2) Towns must be notified of a petition for a highway before the court of sessions adjudge it of common convenience and necessity.

*Commonw. v. Chase & al.* 2 Mass. Rep. 170.

So the court of sessions must adjudge a way to be of common convenience and necessity previously to the laying it out.

*Commonw. v. Cumings & al.* 2 Mass. Rep. 171.

So the sessions cannot lay out or alter a highway without a previous application.

*Commonw. v. Peters.* 3 Mass. Rep. 229.

So the necessity or convenience of an alteration in a highway, and the unreasonableness of the damages awarded, are subjects not within the jurisdiction of the S. J. Court, but belong exclusively to the sessions.

3 Mass. Rep. 406.

## HIGHWAYS AND PRIVATE-WAYS.

or old way altered, the said court are authorized, by warrant, under the seal thereof, to appoint a committee of five disinterested sufficient freeholders, in the same county, to lay out such highway or road ; which committee shall give seasonable notice to all persons interested, of the time and place of their meeting ; (3) and they shall be under oath to perform the said service, according to their best skill and judgment, with most convenience to the public, and least prejudice or damage to private property. (4) And they shall ascertain the place and course of said road, in the best way and manner they can ; which having done, they, or the major part of them, shall make return thereof, under their hands and seals, to the next court of sessions, to be held in the same county, after the said service is performed ; to the end, the same may be accepted, allowed and recorded, and afterwards known for a public highway. (5)

(3) A committee appointed by the court of sessions, to locate a highway, must return specifically, what notice was given to persons interested. 1 Mass. Rep. 86.

When a town has appeared at the sessions, and opposed the acceptance of the report of a locating committee, without objecting the shortness of the notice given by the committee to the town, the S. J. C. will not quash the proceedings of the sessions on account of such shortness. 3 Mass. Rep. 406.

(4) Where a warrant to a locating committee particularly describes their whole duty, an oath *faithfully and impartially to perform the service to which they are appointed, or faithfully and impartially to perform the trust reposed in them*, is sufficient. Ibid.

(5) The proceedings of the sessions, in laying out highways, will be quashed, if it does not appear, 1. That the town has been notified ; or, 2. That the warrant for laying out the way, was under the seal of the court ; or, 3. That the committee were sworn in due form of law ; or, 4. That the owners of the land are named or certified to be unknown, in the return of the locating committee ; or, 5. That damages are assessed, or a return is made, that none is sustained ; or, 6. That the return is under the hands and seals of the committee. 2 Mass. Rep. 489.

The sessions cannot lay out a highway over a navigable river, so as that the river may be obstructed by a bridge. Ibid.

## V. Of highways in unincorporated plantations.

By statute it is provided, that the inhabitants of plantations unincorporated, who are or shall be empowered to assess taxes upon themselves, towards the support of government, or for defraying the charges of any county, shall be vested with like powers, be under the like obligations, and liable to like penalties, so far as such powers, obligations, and penalties have any relation to the making, repairing, or amending the highways, and the compensating any individual who may suffer damage by laying out any highway, as the towns within this commonwealth, have, are under, or subject to ; and like proceedings shall be had by and against such plantations, *mutatis mutandis*, as may be had by or against said towns, in every case respecting the highways. And the assessors of such plantations shall be held to perform all the duties required of the selectmen of towns relating to highways, and invested with the same powers.

Stat. 1796, c. 88, s. 1.

## VI. Of highways through proprietors' lands, in unincorporated towns, and plantations.

By statute it is enacted, that all highways laid out, or to be laid out, through any tracts of land in the commonwealth, not comprehended within the bounds of any incorporated town or plantation aforesaid, shall be made passable and convenient for travelling, and kept in good repair by the owners or proprietors of the said tract of land, township, or plantation ; unless in the judgment of the court of sessions for the county in which such lands lie, it may be deemed unreasonable ; in which case, the same shall be done at the expense of the county, or partly at the expense of the county, and partly at the expense of the proprietors, as the said court shall order. And all the proprietors or owners of such tracts of land, townships, or plantations last mentioned, shall be held to pay their proportions according to their interest, of all

Ibid. s. 2.

Proprietors to keep highways in repair.

Exceptions.

Expense to be apportioned.

What lands are exempted from taxes.

cost and expenses of making and repairing the ways aforesaid, through any part of the tracts, townships, or plantations last mentioned. *Provided nevertheless*, that all lands reserved for the use of the first settled minister, the ministry, schools, or for the future appropriation of the general court, in the said tracts, plantations, and townships last mentioned, shall be exempted from all taxes for making and repairing highways therein.

Ibid. s. 3.

Application to the sessions for a new highway, or to repair one already laid out.

It is further enacted, that the courts of sessions in the several counties in this commonwealth, whenever application shall be made to them to lay out any new highway, through any such tract, township, or plantation last mentioned, or for an order thereof to amend and repair any highway already laid out in the same, the said court shall cause notice thereof to be given, by publishing the substance of such application three weeks successively, in one of the newspapers printed in the town of Boston, and such other paper as the said court shall direct, in order that the proprietors of said land may appear before said court, at such time as the court shall therein prefix, and shew cause why such highway should not be laid out or amended, as the case may be.

Notice to be given of such application.

Ibid.

Proceedings in case proprietors do not appear in pursuance of such notice.

And if such proprietors do not appear, and shew cause to the satisfaction of said court, that such highway ought not to be laid out, or made, or mended, at the expense of said proprietors, then the said court may proceed to lay out such highway in the manner prescribed by law, and to order the same to be made or amended, at the expense of said proprietors, as the case may require; and shall cause an assessment to be made on such tracts of land, township, or plantation, at so much per acre, as they shall judge necessary for making or amending such highway, and defraying the necessary expense attending the same; and the proprietors of the said tracts, townships, or plantations last mentioned, where the lands therein are held in severalty, shall be assessed their respective proportions in every tax which may be ordered

How proprietors are to be assessed.

for making or repairing the highways therein: *Provided*, such proprietors shall previously furnish said court with proper documents for that purpose; and the treasurer of the county wherein the land so assessed may lie, shall forthwith cause such tax, to be advertised in manner aforesaid, requiring each and every owner or proprietor of any part of the tract, township, or plantation last mentioned, to pay said tax, or if the assessment is made in severalty, his part thereof to said treasurer, within six months from the first publishing said advertisement, and notifying such proprietors, that, unless the same shall be paid within the time specified, so much of the said land will be sold at public vendue, at a certain day and place, in the said advertisement to be expressed. And when any proprietor or owner of any part of such tract, township, or plantation last mentioned, (the parts thereof not being severally assessed,) shall pay his proportion of such tax, he shall take a receipt therefor, describing the land for which he shall pay such tax; and so much of the remaining part of such land for which said tax shall not be paid, before the expiration of the said six months, shall be sold by the treasurer aforesaid, or his successor in office, or such committee as the court of sessions aforesaid shall appoint for that purpose, at the time and place set forth in the advertisement, as may be necessary to pay the remaining part of said tax, with incidental charges.

Tax to be advertised.

Proprietors to be notified.

Duty of a proprietor who pays his proportion of the tax.

In default of payment, land to be sold at auction.

Time of sale.

Ibid.

Adjournment of the sale.

Right of redemption.

Application of the money raised by the sale.

And the said treasurer or committee, are authorized to adjourn the time of sale of such land, from day to day, if he or they shall judge it necessary, not exceeding three days, and make a good and sufficient deed or deeds of such lands, allowing the same time of redemption, and subject to the payment of the like interest, as is by law allowed in the cases of land sold for taxes; and the money so raised shall be applied by said court, or by a committee to be by them appointed for that purpose, to make and repair said highways.

*Ibid.*

And a similar method shall be taken from time to time by said court, for keeping in repair all highways leading through such tracts, townships, or plantations last mentioned, in case the owners thereof shall neglect to keep said highway in sufficient repair.

*Ibid.*

Proprietors authorized to call meetings to raise money, for highway purposes.

And the owners and proprietors of any such tract, township, or plantation last mentioned, are authorized to call meetings for the purpose of raising such sums of money as they may judge necessary, for making and repairing such highways, and for choosing officers for assessing and collecting the same.

VII. Of the time allowed towns, &c. to complete a new highway, and the penalty for their neglect of duty.

*Ibid. a. c.*

It is enacted, that when any new highway has been, or shall have been laid out, and accepted by the court of sessions, a reasonable time shall be allowed to the town or district, or any plantation assessed in any state and county tax, through which such highway shall lead, to make it passable, safe, and convenient for travellers, and others passing with their teams, waggon, or other carriages, provided that such time shall not exceed twelve months from the time of such acceptance, unless such court shall, for reasons specially given, order a longer time.

*Ibid.*

And if any town, district, or plantation aforesaid, shall neglect their duty in that respect, the said court, on application therefor, shall appoint a committee of three disinterested freeholders in the same county, to enter into any contract or contracts for making such new highway passable as aforesaid, the expense of which, shall be immediately afterwards defrayed by the delinquent town, district, or plantation last mentioned; and in default thereof, the said court shall issue a warrant of distress against such town, district, or plantation.

VIII. Of the discontinuance of highways and private-ways.

The justices of the respective courts of sessions, upon application to them made by any party aggrieved, at the continuance of any private-way, may order and direct a discontinuance thereof, after notifying and hearing the parties interested therein, if they shall thereupon adjudge and determine such discontinuance reasonable.

Stat. 1786, c. 67, s. 2.

So any court of sessions, upon petition or otherwise, may discontinue any high way or public road within the same county, in part or whole, whenever they shall be fully satisfied, that it is not expedient that the same should be continued any longer.

Stat. 1797, c. 30, s. 1.

Establishing an alteration in a highway is, in law, a discontinuance of the part altered; and the report of the discontinuance, and the acceptance of it are merely surplusage.

Commonwealth v.  
Westborough.  
3 Mass. Rep. 406.

TITLE LXXIX.

HOMICIDE.

4 Bl. Com. 177.

**HOMICIDE**, which signifies the killing of a human being, is divided into three kinds ; the first is called, *justifiable* ; the second, *excusable* ; the third, *felonious*.

Justifiable homicide is where one takes away the life of another, by express command and warrant of law ; or in advancement of public justice ; or to prevent the commission of a forcible and capital offence. Excusable homicide is where one kills another by misadventure ; or, (in case of a sudden affray) in defence of his own life, or to prevent some enormous bodily harm, which is called *chance-medly*. Felonious homicide is either manslaughter or murder, according to the degree of turpitude which marks the homicide.

1. Of homicide committed by warrant of law.
2. Of homicide committed for the advancement of public justice.
3. Of Homicide committed for the prevention of crimes.
4. Of homicide by misadventure.
5. Of homicide by *chance-medly*.
6. Of manslaughter.
7. Of murder.
8. Of the proof and the punishment.

I. Of homicide committed by warrant of law.

4 Bl. Com. 178.

A homicide is justifiable when committed by express command or warrant of law. As, for instance, by virtue of such an office as obliges one, in the execution of public justice, to put a malefactor to death, who hath forfeited his life by the laws and verdict of his country. But the law must *require* it, otherwise it is not justifiable.

And farther, if judgment of death be given by a judge not authorized by lawful commission, and execution be done accordingly, the judge is guilty of murder.

So the execution must pursue the sentence of the court. <sup>Ibid. 179.</sup> If, therefore, an officer beheads one who is adjudged to be hanged, or *vice versa*, it is murder : for he is merely ministerial, and therefore only justified when he acts under the authority and compulsion of law.

II. Of homicide committed for the advancement of public justice.

Homicides committed for the advancement of public justice, are, 1st. Where an officer, in the execution of his office, either in a civil or criminal case, kills a person that assaults and resists him. 2. If an officer, or any private person, attempts to take a man charged with felony, and is resisted; and, in the endeavour to take him, kills him. 3. In case of a riotous and tumultuous assembly, if any such rioter be killed by the officers, endeavouring to disperse the mob, such officers and their assistants shall be held guiltless. <sup>Ibid.</sup> <sup>Stat. 1786, c. 38, s. 1</sup>

But, in all these cases, there must be an apparent necessity on the officer's side, viz. that the party could not be arrested or apprehended, the riot could not be suppressed, &c. otherwise, without such absolute necessity, it is not justifiable. <sup>4 Bl. Com. 180.</sup>

III. Of homicide committed for the prevention of crimes.

Such homicide as is committed for the *prevention* of any forcible and atrocious crime, is justifiable, both by the law of nature and the municipal law. <sup>Ibid.</sup>

Thus, if any person attempts a robbery or murder of another, or attempts to break open or burn a house in the night time, and shall be killed in such attempt, the slayer shall be acquitted. This reaches not to any crime unaccompanied with force, as picking of pockets; or to the <sup>Ibid.</sup>

breaking open of any house *in the day time*, unless it carries with it an attempt of robbery also.

*Ibid.* 181.

The law likewise justifies a woman killing one who attempts to ravish her.

*Ibid.*

And so too, the husband or father may justify killing a man who attempts a rape upon his wife or daughter ; but not if he takes them in adultery by consent, for the one is forcible and felonious, but not the other.

*Ibid.*

And the one uniform principle, that runs through our laws, seems to be this, that where a crime, in itself capital, is endeavoured to be committed by force, it is lawful to repel that force by the death of the party attempting.

#### IV. Of homicide by misadventure.

*Ibid.* 182.

Homicide, *per infortunium* or *misadventure*, is, where a man, doing a lawful act, without any intention of hurt, unfortunately kills another ; as where a man is at work with a hatchet, and the head thereof flies off and kills a stander-by ; or where a person is shooting at a mark, and undesignedly kills a man : for the act is lawful, and the effect is merely accidental.

*Ibid.*

So where a parent is moderately correcting his child, a master his apprentice or scholar, or an officer punishing a criminal, and happens to occasion his death, it is only misadventure ; for the act of correction was lawful.

*Ibid.*

But if he exceeds the bounds of moderation, either in the manner, the instrument, or the quantity of punishment, it is manslaughter at least, and in some cases (according to the circumstances) murder ; for the act of immoderate correction is unlawful.

*Ibid.* 183.

Likewise, to whip another's horse, whereby he runs over a child and kills him, is held to be accidental in the rider, for he has done nothing unlawful ; but manslaughter in the person who whipped him, for the act was a trespass, and, at best, a piece of idleness, of inevitably dangerous consequence.

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And in general, if death ensues, in consequence of an idle, dangerous and unlawful sport, the slayer is guilty of manslaughter, and not misadventure only. <sup>Ibid.</sup>

### V. Of homicide by *chance-medley*.

Homicide, in self-defence, *upon a sudden affray*, is also excusable in law, and is called *chance-medley*. But this species of self-defence must be distinguished from that before-mentioned, as calculated to hinder the perpetration of a capital crime, where the slayer is in no fault; and which, in contradistinction to the other, is called *justifiable self-defence*. <sup>4 Bl. Com. 183.</sup>

For a man may repel force by force, in defence of his person, habitation or property, against one who manifestly intends or endeavours, by *violence or surprise*, to commit a known felony, such as murder, rape, robbery, arson, burglary, and the like upon either. In these cases, he is not obliged to retreat, but may pursue his adversary until he has secured himself from all danger; and if he kill him in so doing, it is called justifiable self-defence: as, on the other hand, the killing by such felons of any person, so lawfully defending himself, will be murder. <sup>1 East's C. L. 271.</sup>

But to excuse homicide upon *chance-medley* in self-defence, it must appear that the slayer had no other possible (or, at least, probable) means of escaping from his assailant. <sup>4 Bl. Com. 184.</sup>

It is frequently difficult to distinguish this species of homicide (upon *chance-medley* in self-defence) from that of manslaughter, in the proper, legal sense of the word. But the true criterion between them seems to be this: when both parties are actually combating at the time the mortal stroke is given, the slayer is then guilty of manslaughter; but if the slayer hath not begun to fight, or, (having begun) endeavours to decline any farther struggle, and afterwards, being closely pressed by his antagonist, kills him to avoid his own destruction, this is homicide excusable by self-defence. For which reason, the <sup>Ibid. 184, 185.</sup>

law requires that the slayer, in this case, should retreat as far as he conveniently can, to avoid the violence of the assault, before he turns upon his assailant; and that not fictitiously, or in order to watch his opportunity, but from a real tenderness of shedding his brother's blood. But if the assault be so fierce, as not to allow the person assailed to yield a step, without manifest danger of his life, or enormous bodily harm, then, in his defence, he may kill his assailant instantly. And this, (continues Blackstone) is the doctrine of universal justice, as well as of the municipal law.

*Ibid.* 186.

Under this excuse of self-defence, the principal civil and natural relations are comprehended; therefore master and servant, parent and child, husband and wife, killing an assailant in the necessary defence of each other respectively, are excused; the act of the relation assisting being construed the same as the act of the party himself.

#### VI. Of manslaughter.

*Ibid.* 190, 191.

Manslaughter is the unlawful killing of another, without malice, either express or implied. Which may be either voluntary, upon a sudden heat; or involuntary, but in the commission of some unlawful act. And hence it follows, that, in manslaughter, there can be no accessories before the fact; because it must be done without premeditation.

*Ibid.* 191.

As to the first, or *voluntary* branch: if, upon a sudden quarrel, two persons fight, and one of them kills the other, this is manslaughter. And so it is, if they, upon such an occasion, go out and fight in a field; for this is one continued act of passion: and the law pays that regard to human frailty, as not to put a hasty and deliberate act upon the same footing with regard to guilt. So also if a man be greatly provoked, as by pulling his nose, or other great indignity, and immediately kills the aggressor, though this is not excusable in *self-defence*, since there

is no absolute necessity for doing it to preserve himself; yet neither is it murder, for there is no previous malice; but it is manslaughter. And in this, and in every other case of homicide upon provocation, if there be a sufficient cooling time for passion to subside, and reason to interpose, and the person so provoked afterwards kills the other, this is deliberate revenge, and not heat of blood, and accordingly amounts to murder.

Manslaughter on a sudden provocation, differs from excusable homicide *in self-defence* in this, that in one case <sup>Ibid. 192.</sup> there is an apparent necessity, for self-preservation, to kill the aggressor; in the other, no necessity at all, being only a sudden act of revenge.

The second branch, or *involuntary* manslaughter, differs also from homicide excusable by misadventure, in this, that misadventure always happens in consequence of a *lawful* act, but this species of manslaughter, in consequence of an unlawful one. <sup>Ibid.</sup>

So where a person does an act, lawful in itself, but in an unlawful manner, and without due caution and circumspection; as when a workman flings down a stone or piece of timber into the street, and kills a man, this may be either misadventure, manslaughter or murder, according to the circumstances under which the original act was done: if it were in a country village, where few passengers are, and he calls out to all people to have a care, it is misadventure only; but if it were in London, where people are continually passing, it is manslaughter, though he gives loud warning; and murder, if he knows of their passing, and gives no warning at all, for then it is malice against all mankind. And, in general, when an involuntary killing happens in consequence of an unlawful act, it will be either murder or manslaughter, according to the nature of the act which occasioned it. If it be in prosecution of a felonious intent, or in its consequences, naturally tended to bloodshed, it will be murder; but if no more was intended than a mere civil trespass, it will only amount to manslaughter. <sup>Ibid. 192, 193.</sup>

## VII. Of murder.

4 Bl. Com. 195.  
3 Inst. 47.

Murder is when a person of sound memory and discretion, unlawfully killeth any reasonable creature in being, and under the public peace, with malice aforethought, either express or implied.

4 Bl. Com. 195.

First, it must be committed by a *person of sound memory and discretion*; for lunatics or infants are incapable of committing any crime: unless in such cases where they shew a consciousness of doing wrong, and of course a discretion, or discernment between good and evil.

Ibid. 195, 196.

Next, it happens when a person of such sound discretion *unlawfully* killeth. The unlawfulness arises from the killing without warrant or excuse; and there must also be an actual killing to constitute murder; for a bare assault, with *intent* to kill, is only a great misdemeanor, though formerly it was held to be murder. The killing may be by poisoning, striking, starving, drowning, and a thousand other forms of death, by which human nature may be overcome. And if a person be indicted for one species of killing, as by *poisoning*, he cannot be convicted by evidence of a totally different species of death, as by *shooting* with a pistol, or *starving*. But where they only differ in circumstance, as if a *wound* be alleged to be given with a sword, and it proves to have arisen from a staff, an axe, or hatchet, this difference is immaterial.

Ibid. 197.

If a man does such an act, of which the probable consequence may be, and eventually is death; such killing may be murder, although no stroke be struck by himself, and no killing may be primarily intended: as was the case of the unnatural son, who exposed his sick father to the air, against his will, by reason whereof he died; of the harlot, who laid her child under leaves in an orchard, where a kite struck it, and killed it; and of the parish officers, who shifted a child from parish to parish, till it died for want of care and sustenance.

Ibid.

So too, if a man hath a beast that is used to do mischief; and he, knowing it, *suffers* it to go abroad, and it

kills a man, even this is manslaughter in the owner : but if he had purposely *turned it loose*, though barely to frighten people, and make what is called sport, it is with us (as in the Jewish law) as much murder, as if he had incited a bear or dog to worry them.

If a physician or surgeon gives his patient a portion or plaister, to cure him, which, contrary to expectation, kills him, this is neither murder, nor manslaughter, but misadventure; and he shall not be punished criminally, however liable he might formerly have been to a civil action for neglect or ignorance : but it hath been holden, that if it be a *regular* physician or surgeon, who administers the medicine, or performs the operation, it is manslaughter at the least. Yet Sir Matthew Hale very justly questions the law of this determination.

In order also to make the killing murder, it is requisite that the party die within a year and a day after the stroke received, or cause of death administered ; in the computation of which, the whole day upon which the hurt was done shall be reckoned the first.

Farther; the person killed must be "*a reasonable creature in being, and under the public peace,*" at the time of the killing.

To kill a child in its mother's womb is now no murder, but a great misprision : but if the child be born alive, and dieth by reason of the portion or bruises it received in the womb, it seems, by the better opinion, to be murder in such as administered or gave them.

Lastly, the killing must be committed *with malice aforethought*, to make it the crime of murder. This is the grand criterion which distinguishes murder from other killing : and this malice prepense, is not so properly spite or malevolence to the deceased in particular, as an evil design in general ; the dictate of a wicked, depraved, and malignant heart. And it may be either *express*, or *implied* in law.

*Ibid.*

Express malice is where one, with a sedate deliberate mind, and formed design, doth kill another: which formed design is evidenced by external circumstances discovering that inward intention; as lying in wait, antecedent menaces, former grudges, and concerted schemes to do him some bodily harm. This takes in the case of deliberate duelling, where both parties meet avowedly with an intent to murder.

*Ibid.*

Also, if even upon a sudden provocation, one beats another in a cruel and unusual manner, so that he dies, though he did not intend his death, yet he is guilty of murder by express malice; that is, by an express evil design, the genuine sense of *malitia*.

*Ibid.*

As when a park-keeper tied a boy, that was stealing wood, to a horse's tail, and dragged him along the park; when a master corrected his servant with an iron bar; and a schoolmaster stamped on his scholar's belly; so that each of the sufferers died; these were justly held to be murders, because the correction being excessive, and such as could not proceed but from a bad heart, it was equivalent to a deliberate act of slaughter.

*Ibid.* 199, 200.

Neither shall he be guilty of a less crime, who kills another in consequence of such a wilful act as shews him to be an enemy to all mankind in general; as going deliberately, and with an intent to do mischief, upon a horse used to strike, or coolly discharging a gun among a multitude of people.

*Ibid.* 200.

So if a man resolves to kill the next man he meets, and does kill him, it is murder, although he knew him not; for this is universal malice.

*Ibid.*

And if two or more come together, to do an unlawful act against the public peace, of which the probable consequence might be bloodshed; as to beat a man, to commit a riot, or to rob a park: and one of them kills a man: it is murder in them all, because of the unlawful act, the *malitia precogitata*, or evil intended beforehand.

Also in many cases where no malice is expressed, the law will imply it; as where a man wilfully poisons another: in such a deliberate act the law presumes malice, though no particular enmity can be proved. And if a man kills another suddenly, without any, or without a considerable provocation, the law implies malice; for no person, unless of an abandoned heart, would be guilty of such an act, upon a slight or no apparent cause. <sup>Ibid.</sup>

No affront, by words or gestures only, is a sufficient provocation, so as to excuse or extenuate such acts of violence as manifestly endanger the life another. <sup>Ibid.</sup> But if a person so provoked had unfortunately killed the other, by beating him in such a manner as shewed only an intent to chastise him, and not to kill him, the law so far considers the provocation of contumelious behaviour, as to judge it only manslaughter and not murder.

In like manner, if one kills an officer of justice, either civil, or criminal, in the execution of his duty, or any of his assistants endeavouring to conserve the peace, or any private person endeavouring to suppress an affray, or apprehend a felon, knowing his authority or the intention with which he interposes, the law will imply malice, and the killer shall be guilty of murder. <sup>Ibid.</sup>

And if one intends to do another felony, and undesignedly kills a man, this is also murder. Thus if one shoots at A, and misses him, but kills B, this is murder, because of the previous felonious intent, which the law transfers from one to the other. <sup>Ibid. 200, 201.</sup> The same is the case where one lays poison for A, and B, against whom the prisoner had no malicious intent, takes it, and it kills him; this is likewise murder. So also, if one gives a woman with child a medicine to procure abortion, and it operates so violently as to kill the woman, this is murder in the person who gave it.

It were endless to go through all the cases of homicide, which have been adjudged either expressly or impliedly malicious: these, therefore, may suffice as a spe- <sup>Ibid. 211.</sup>

cimen ; and we may take it for a general rule, that all homicide is malicious, and of course amounts to murder, unless where *justified* by the command or permission of the law : *excused* on the account of accident or self-preservation ; or alleviated into manslaughter, by being either the involuntary consequence of some act, not strictly lawful, or (if voluntary) occasioned by some sudden and sufficiently violent provocation.

#### VIII. Of the proof and the punishment.

##### 1. The proof.

1 East. C. L. 340.

On every charge of murder, the fact of killing being first proved, the law presumes it to have been founded in malice until the contrary appear : and therefore, all circumstances alleged by way of justification, excuse, or alleviation, must be proved by the prisoner, unless they arise out of the evidence produced against him. Upon the truth of these facts, so alleged, the jury alone are to decide ; but whether, taking them to be true, the homicide be justified, excused or alleviated, is a matter of law, upon which the jury ought to be guided by the direction of the court.

##### 2. The punishment.

Stat. 1804, c. 123, s. 1.

Manslaughter is punished by solitary imprisonment, for such term, not exceeding one year, and by imprisonment afterwards in the common gaol, or confinement to hard labour, for such term not exceeding three years, as the court before whom the conviction may be, shall sentence and order, according to the aggravation of the offence.

Ibid. s. 1.

The punishment of murder is death.

TITLE LXXIX.

HOUSE OF CORRECTION.

1. **O**f the establishment of houses of correction.
2. What persons are liable to be committed to such houses.
3. Of the discharge of persons thus committed.
4. Of the appropriation of their earnings.
5. Of the keeper of such house, his duty, power and compensation.
6. Of the overseers of such houses, their power, duty and compensation.
7. Of the providing materials for the work of such houses.
8. Of the superintendence of such houses.

I. Of the establishment of houses of correction.

By statute it is enacted, that there shall be erected, built or otherwise provided by the court of general sessions of the peace, in every county within this commonwealth, at the charge of such county, a fit and convenient house or houses of correction, with convenient accommodations thereunto adjoining and belonging ; to be used and employed, for the keeping, correcting and setting to work of rogues, vagabonds, common beggars and other idle, disorderly and lewd persons.

Stat. 1787, c. 54, s. 1.

II. What persons are liable to be committed to such houses.

Any justice of the peace, as well as the court of sessions, may send and commit unto the said house, to be kept and governed according to the rules and orders

Ibid. s. 2.

Rogues, vagabonds and idle persons may be committed.

thereof, all rogues, vagabonds, and idle persons, going about any town or place in the county begging; or persons using any subtle craft, juggling, or unlawful games or plays, or feigning themselves to have knowledge in phisiognomy, palmistry, or pretending that they can tell destinies or fortunes, or discover where lost or stolen goods may be found; common pipers, fiddlers, runaways, stubborn servants or children, common drunkards, common night-walkers, pilferers, wanton and lascivious persons in speech, conduct or behaviour; common railers or bawlers, such as neglect their callings or employment, mispend what they earn, and do not provide for themselves or the support of their families, upon conviction of any of the offences or disorders aforesaid, complaint thereof being made in writing.

Stat. 1797, c. 62, s. 3.

Lunatics may be committed.

So when it shall be made to appear to any two justices *quorum unus*, that any person, being within their county, is lunatic, and so furiously mad as to render it dangerous to the peace and safety of the good people, for such lunatic person to go at large; the said justices shall have full power, by warrant under their hands and seals, to commit such person to the house of correction, there to be detained till he or she be restored to his or her right mind, or otherwise delivered by due course of law. And every person so committed, shall be kept at his or her own expense, if he or she have estate, otherwise at the charge of the person or town upon whom his or her maintenance was regularly to be charged, if he or she had not been committed; and he or she shall, if able, be put to work during his or her confinement.

Stat. 1802, c. 22, s. 3.

Culprits, punishable by imprisonment, may be committed.

So by a subsequent act, any person standing convicted before the supreme judicial court, or court of general sessions of the peace, for any crime punishable in whole, or in part, by imprisonment, may be sentenced, by either of said courts, to suffer his imprisonment, either in the common gaol, or in the house of correction, at their discretion, to be employed and kept to work therein, in the

same manner as persons committed to said house, pursuant to the acts to which this is in further addition.

So either of the said courts may sentence any person standing convicted before them respectively, punishable in whole or in part by fine, to pay such fine, with costs of prosecution; and in case he does not pay the same within ten days, that he be immediately thereafter conveyed to the house of correction, therein to be safely held, employed and kept to work, in the same manner as persons committed to the said house, pursuant to the acts to which this is in further addition, for any term of time not exceeding six months. And the expense of keeping, supporting, and employing such offenders, after deducting the net amount of their earnings, shall be allowed by the justices of the court of sessions, and paid to the keeper out of the county treasury, in the same manner, and with the same right of reimbursement from the treasury of the commonwealth, as the accounts of gaolers for the prison charges of persons confined in gaol, on charge of conviction of crimes and offences committed against the said commonwealth.

*Ibid.* s. 4.

Culprits, punishable by fine, and who neglect to pay such fine, may be committed.

### III. Of the discharge of persons thus committed.

Whenever any person, committed as aforesaid, shall apply to the master of said house for a discharge therefrom, the said master shall signify the same to the overseers of the poor of the town in which such house of correction shall be, or to the overseers of such town as the person, so committed, shall belong to; and the major part of either of the overseers of the poor aforesaid, upon its being made to appear to them that the ends of such commitment have been answered, are empowered to issue their order to the master of such house of correction to discharge the said person from his or her said confinement; the charges arising therefrom being first paid in manner as is before provided, and the said master is required to discharge him or her accordingly.

Stat. 1787, c. 54, s. 5.

## IV. Of the appropriation of their earnings.

*Ibid.* s. 4.

The persons committed shall be allowed two-third parts only of what they earn, and the residue shall be to the use of the master or keeper of the house ; unless such persons are masters or heads of families, then the whole profit of their labour, or so much of it as the court of sessions shall order, shall be for the relief of such persons and their families. And if any person, committed as aforesaid, shall be unable to work, or be weak and sick, or the profits of whose work shall not be sufficient for supporting him or her, then to be comfortably provided for and taken care of by the master of the same house, who shall be reimbursed the same by the parent, master, town, or the government, who are by law obliged to maintain and support such persons, when unable to support themselves, as the case may require.

## V. Of the keeper of such house, his duty, power and compensation.

*Ibid.* s. 2.

Appointment of the keeper.

The court of general sessions of the peace in each county may nominate and appoint, at their will and pleasure, a suitable person to be master of such house of correction. And also, to make, ordain, and establish such rules and orders as may be necessary, (not repugnant to the laws of this commonwealth,) for the ruling, governing, and punishing of such persons as may be there committed ; and such rules and orders by them made, shall be in force and put in execution.

*Ibid.*

The power and authority of such keeper or master.

It is by statute further provided, that the master of such house of correction to be appointed as aforesaid, shall have power and authority, and shall set all such rogues, vagabonds, beggars, and other lewd, idle, and disorderly persons as aforesaid, that shall be duly sent or committed unto his custody, to work and labour, (if they be able,) for such time as they shall continue and remain in the said house ; and to punish them by putting shackles

or fetters upon them; and also, from time to time, in case they be stubborn, disorderly, idle, or refractory, and do not perform their tasks, and in good condition, according as they shall be reasonably stinted, to abridge them of their food, as the case shall require, until they be reduced to better order.

It is also provided, that the master of the said house of correction shall, for his care, labour, and service in looking after the several persons that shall, from time to time, be committed to his care and custody, over and above one-third part of their net earnings, have such reasonable allowance made him, as the justices, in session, shall order and direct to be paid him, by the parent or master of such as are under their immediate care and custody, otherwise by the town to which such persons belong, if within this government; or at the charge of the government, if they belong to no particular town within it. And the master or keeper of every such house, shall keep an exact account of all such profits and earnings, that shall arise from the labour of all such as shall be committed to his care and custody, as well as the particular time of their commitment and liberation, and present the same account (upon oath, if required,) unto the justices of the peace for the same county, annually, and also, whenever he shall by them be thereunto directed; and in default thereof may be amerced by the said justices in their sessions, not exceeding *one hundred pounds*.

*Ibid.* s. 5.

His compensation.

His duty to keep an account of the earnings of the labourers.

Penalty for default.

VI. Of the overseers of such houses, their power, duty and compensation.

By statute it is enacted, that the courts of general sessions of the peace, in their respective counties, where the circumstances may require it, are authorized and empowered annually, to appoint three or five suitable and discreet freeholders of their county, living near the house of correction, to be overseers of such house; who shall

Stat. 1757, c. 62, s. 1.

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have power to see that the rules appointed by the said court, for the government of the house and the persons therein confined, be duly observed ; and also to examine the accounts of the keeper, with respect to the earnings of the prisoners and the expense of the institution, and they shall keep a register of all their proceedings fairly written. They shall have power to make contracts for work to be done in the house with any person disposed to supply the materials, and to make contracts for letting out any of the persons confined to employers living, in the estimation of the overseers, conveniently near to the house of correction for the overseers or the masters of the house to have the general inspection of the persons so let out, and of the treatment they receive. And the overseers shall receive, out of the wages of the prisoners, such reasonable compensation as the court of sessions shall allow.

VII. Of the providing materials for the work of such houses.

The statute of 1787, c. 54, s. 4, enacts, that when any person shall be committed to the said house, the selectmen of the town to which he or she belongs, (if within the government,) shall, at the town's expense, provide suitable materials, and such as shall be convenient and necessary, to keep the person thus committed to work during his or her continuing there, and deliver the same to the master or keeper of the house for that purpose. And when any stubborn children or servants, under the immediate care and government of parents or masters, shall be committed to the said house, the parent or master, (if able,) shall take care and provide such things as may be necessary, to keep him or her to work and labour, during his or her abode in said house.

By statute of 1797, c. 62, s. 4, it is declared, that all privileges granted to towns to provide work for their in-

habitants at the county house of correction, and also to provide for their support there, shall remain in force, notwithstanding said act of 1797, c. 62, aforesaid.

But the statute of 1802, c. 22, s. 1, qualifies this privilege by enacting, that no town, parent or master, shall be allowed to furnish any such materials as aforesaid, without the consent of the keeper or overseers.

This last act further provides, that the courts of general sessions of the peace, in their respective counties, shall provide and cause to be kept at the expense of their counties, suitable materials, sufficient at all times to employ and keep at work, such as are or may be committed to the house of correction, by force of any laws of this commonwealth. Sec. 1.

#### VIII. Of the superintendence of such houses.

By the statute of 1787, c. 54, s. 2, the court of general sessions of the peace may make necessary rules for the government of such houses. The sessions may establish rules for their government.

By statute 1797, c. 62, s. 2, said court of sessions shall at any term have authority to remove any of the overseers, and to replace others for the remainder of the year, and to fill up any vacancies of the overseers made by death, resignation, or otherwise. They shall also, at every term, inquire into the state of the house of correction, examine the register and accounts of the overseers and masters, and make such further regulations and alterations in the treatment and government of the prisoners, as they shall judge necessary or proper, and not repugnant to the laws of the commonwealth. The sessions may remove any of the overseers, and fill up any vacancies in such office;  
And make regulations, etc.

So by sec. 4, of the same statute, the persons confined shall be wholly under the government of the overseers and master, to be appointed by the court of sessions as provided by the act; and all charges attending the business, more than the wages of the prisoners, or such expenses as arise, and ought to be borne by the individual Persons confined, to be under the government of the overseers etc.  
Charges, how to be defrayed.

## HOUSE OF CORRECTION.

out of their estates, shall be paid out of the county treasury, when allowed by the court of sessions.

Further power and  
duty of the sessions.

By statute 1802, c. 22, s. 1, the sessions shall, from time to time, make and establish all necessary rules and regulations, touching the employment of persons so committed; the procurement and preservation of said materials; the keeping of accounts of the expenses and costs of such materials, and the labour performed by the persons committed to the said house, and the settling of the same.

TITLE LXXXI.

HUSBAND AND WIFE.

1. **O**F the dominion of the husband over the person of the wife ; and his liability for her offences.
2. Of the dominion of the husband over the estate of the wife.
3. Of the liability of the husband to the debts of the wife contracted before marriage.
4. Of the liability of the husband to the debts of the wife contracted during marriage.
5. When the husband and wife must join and be joined, in actions brought by and against them.
6. Of the power of the wife when abandoned by her husband.

I. Of the dominion of the husband over the person of the wife ; and his liability for her offences.

The law permits the husband to restrain his wife of her liberty, in case of any gross misbehaviour ; but if he use her outrageously, or threaten to do so, she may have security of the peace against him ; and so, in return, the husband against the wife.

<sup>1</sup> Bl. Com. 444, 445.  
<sup>1</sup> Bac. Abr. 285.

In all cases where the wife offends alone, without the company or coercion of her husband, she is responsible for her offence, as much as any single woman.

<sup>4</sup> Bl. Com. 29.

A married woman is however so much favoured in respect of that authority, which her husband has over her, that if she commit theft, or other civil offences against the laws of society, by the coercion of her husband ; or even in his company, which the law construes a coercion ; she is not guilty of any crime ; being considered as acting by compulsion, and not of her own will.

<sup>1</sup> Bac. Abr. 294.  
<sup>4</sup> Bl. Com. 28.

Ibid. 29.

But this rule admits of an exception in crimes that are *malu in se*, and prohibited by the law of nature, as murder, and the like : not only because these are of a deeper dye ; but also, since in a state of nature no one is in subjection to another, it would be unreasonable to screen an offender from the punishment due to natural crimes, by the refinements and subordinations of civil society. In treason also, (the highest crime which a member of society can, as such, be guilty of,) no plea of coverture shall excuse the wife ; no presumption of the husband's coercion shall extenuate her guilt ; as well because of the odiousness and dangerous consequence of the crime itself, as because the husband, having broken through the most sacred tie of social community, by rebellion against the state, has no right to that obedience from a wife, which he himself, as a subject, has forgotten to pay.

Ibid.

In inferior misdemeanors, also, we may remark another exception ; that a wife may be indicted *with* her husband, for keeping a brothel ; for this is an offence touching the domestic economy or government of the house, in which the wife has a principal share ; and is also such an offence as the law presumes to be generally conducted by the intrigues of the female sex.

Ibid. 39.

A married woman cannot become an accessory to a felony by the receipt and concealment of her husband ; for she is presumed to act under his coercion, and therefore she is not bound, neither ought she, to discover her lord.

3 Bac. Abr. 294.

If the wife incur the forfeiture of a penal statute, the husband may be made a party to an action or information to the same, as he may be, generally, to any suit for a cause of action given by his wife, and shall be liable to answer what shall be recovered thereon.

## II. Of the dominion of the husband over the estate of the wife.

2 Bl. Com. 433.

By marriage, those chattels which belonged formerly to the wife, are, by act of law, vested in the husband, with

the same degree of property, and with the same powers, as the wife, when sole, had over them.

This depends entirely on the notion of an unity of person between the husband and wife; it being held, that they are one person in law, so that the very being and existence of the woman is suspended during the coverture, or entirely merged or incorporated in that of the husband. And hence it follows, that whatever personal estate belonged to the wife, before marriage, is by marriage, absolutely vested in the husband. Ibid.

In a real estate, he only gains a title to the rents and profits during coverture: for that, depending upon foedal principles, remains entire to the wife after the death of her husband, or to her heirs, if she dies before him; unless, by the birth of a child, he becomes tenant for life by the curtesy. But in chattel interests, the sole and absolute property vests in the husband, to be disposed of at his pleasure, if he chooses to take possession of them: for unless he reduces them to possession, by exercising some act of ownership upon them, no property vests in him, but they shall remain to the wife, or to her representatives, after the coverture is determined. Ibid.

There is therefore a very considerable difference in the acquisition of this species of property by the husband, according to the subject matter, viz. whether it be a chattel *real* or a chattel *personal*; and of chattels personal, whether it be in *possession*, or in *action* only. A chattel *real* vests in the husband, not absolutely, but *sub modo*. As in case of a lease for years, the husband shall receive all the rents and profits of it, and may, if he pleases, sell, surrender, or dispose of it during the coverture: it is liable to execution for his debts: and, if he survive his wife, it is to all intents and purposes his own. Yet, if he has made no disposition thereof in his life-time, and dies before his wife, he cannot dispose of it by will; for, the husband having made no alteration in the property during his life, it never was transferred from the Ibid. 433, 434.

wife; but after his death, she shall remain in her ancient possession, and it shall not go to his executors.

*Ibid.* 434.

So it is also of chattels personal (or choses) in *action*; as debts upon bond, contracts, and the like. These the husband may have if he pleases; that is, if he reduces them into possession by receiving or recovering them at law. And upon such receipt or recovery, they are absolutely and entirely his own; and shall go to his executors or administrators, or as he shall bequeath them by will, and shall not revert in the wife. But if he dies before he has recovered or reduced them into possession, so that at his death they still continue *choses in action*, they shall survive to the wife; for the husband never exerted the power he had of obtaining an exclusive property in them.

*Ibid.*

Thus, in both these species of property, the law is the same, in case the wife survives the husband; but, in case the husband survives the wife, the law is very different with respect to *chattels real* and *choses in action*. For he shall have the *chattels real* by survivorship, but not the *choses in action*.

*Ibid.* 435.

Thus stands the law between husband and wife, with regard to chattels *real* and choses in *action*: but as to chattels *personal* (or choses) in *possession*, which the wife hath in her own right, as ready money, jewels, household goods, and the like, the husband hath therein an immediate and absolute property, devolved to him by the marriage, not only potentially, but in fact, which never can again revert in the wife, or her representative.

III. Of the liability of the husband to the debts of the wife contracted *before* marriage.

*Schw.* 228, 229.

The husband is liable to the debts of the wife, contracted by her before the marriage; and the husband and wife may be sued for such debts during the coverture. But if these debts are not recovered against the husband and wife, in the life-time of the wife, the husband cannot

be charged for them either at law or in equity, after the death of the wife.

IV. Of the liability of the husband to the debts of the wife, contracted *during* marriage.

During the cohabitation of the husband and wife, he is answerable for all debts contracted by her for *necessaries*, from the implied credit arising from cohabitation, but for nothing further.

So if a man cohabits with a woman, to whom he is not married, and permits her to assume his name, and appear to the world as his wife, and, in that character, to contract debts, for necessaries, he will become liable, although the creditor be acquainted with her real situation; for here a like assent will be implied, as in the case of a husband.

These necessaries are to be judged of with reference to the estate of the husband, and of his degree or rank in life. And of this the jury are to judge, and to find accordingly.

So they are also to find the assent as well as the cohabitation of the husband.

But it should be observed, 1st. as cohabitation is *evidence* only of the husband's assent, in a special verdict, that evidence ought to be found; and, 2dly. as cohabitation is *presumptive* evidence only of such assent; it may be rebutted by contrary evidence. In like manner, evidence that the articles purchased were spent in the family of the husband, is only presumptive and not conclusive evidence of the husband's assent.

If the wife elope from her husband, and live in adultery, the husband cannot be charged with her contracts, made during the term of elopement; for during such time, the husband's assent cannot be implied; yet if she returns, and the husband receives her again, the presumption of law revives, and attaches upon the contracts made by her after the reconciliation.

Str. 875.

So if a woman elopes from her husband, though she does not go away with an adulterer, or in an adulterous manner, the tradesman trusts her at his peril, and the husband is not bound.

Todd v. Stokes,  
L. Raym. 444, and  
Salk. 116.  
Selw. 233.

So if the wife, with the consent of her husband, lives apart from him, and has a separate maintenance, and contracts debts for necessities during the separation, the law will presume that she is trusted on her own credit, although the tradesman had not any notice of the separation at the time of the contract, if it were the reputation of the place where the husband lived, that he and his wife were living apart.

Lingworthy v.  
Hackmore,  
per Holt, Ch. J.  
Ld. Raym. 444.  
Selw. 233.

But if the husband turns away his wife, and afterwards she contracts debts for necessities, the husband will be liable; for with her he sends credit for her reasonable expenses.

V. When the husband and wife must join and be joined, in actions brought by and against them.

Selw. 242.

In real actions, for the recovery of lands of the wife, the husband and wife must join.

Ibid.

So in an action of waste, for waste committed on the land of the wife.

Ibid.

If an action is brought in respect of a personal wrong to the wife, the husband and wife must join, and the declaration ought to conclude "to their damage," and not "to the damage of the husband;" for the damages will survive to the wife, if the husband die before they are received.

Ibid. 24.

Where the wife cannot maintain an action for the same cause, if she survive her husband, the action shall be brought by the husband alone; as in an action of *indebitatus assumpsit* for the labour, &c. of the wife during the marriage; for, in contemplation of law, the wife is considered as the servant of the husband, and he is entitled to her earnings, and such earnings shall not survive to

the wife, but go to the personal representative of the husband.

On contracts made by the wife before marriage, as on a bond made to the wife, when single, husband and wife must join in the action. Ibid. 247.

So in actions *against* the husband, for the debts of the wife, contracted before marriage, if the wife is not joined, advantage may be taken of the omission in arrest of judgment; and this rule holds, although an account has been stated with the husband, for that does not alter the nature of the debt. Mitchinson v. Hewson,  
7 T. R. 348.  
  
Sci. w. 251.

VII. Of the power of the wife when abandoned by her husband.

By statute it is enacted, that where any married man shall absent himself from this commonwealth, abandoning his wife, and not making sufficient provision for her support or maintenance, the justices of the supreme judicial court are authorized, at any of the terms of said court, upon the application of any such wife, to empower and enable her, during the absence of her husband from this commonwealth, and no longer, in her own name, to make and execute any contract, either under seal or otherwise, and by deed to sell and convey any estate, real or personal, of which, at the time of such sale, she shall be seized or possessed in her own right; and to commence, prosecute and defend any suit in law or equity, to final judgment and execution, in the same manner, as fully, and to all intents and purposes, as if she was sole and unmarried; or the said justices may grant to any such wife any or all the powers above described, according as they shall judge the circumstances of such wife shall require. Stat. 1787, c. 32, s. 1.  
  
S. J. C. empowered  
to license the sale of  
real estate.

It is further provided, that if any such husband should return into this commonwealth, while any contract made by his wife, pursuant to the powers aforesaid, should remain undischarged, the same remedy shall lie against Ibid. s. 2.  
  
Remedy against the  
husband in case of  
his return.

such husband, as if the contract had been made by her before the marriage ; and no suit pending, wherein his wife shall be a party, pursuant to the said powers, shall abate by his return into this commonwealth.

*Ibid.* s. 3.

Notice of application  
to be given.

It is further provided, that when application shall be made by any wife for any or all of the powers aforesaid, the justices of the said court shall, previous to their granting any of the powers aforesaid, cause such public notice of the said application to be given, as by law they are directed in case of any libel filed by any married woman, for a divorce.

TITLE LXXXII.

IMPOUNDING.

1. **O**r the duty of towns to maintain pounds, and the penalty for neglect of such duty.

2. What creatures may be impounded ; and for what causes.

3. Of the notice to owners, whose creatures are impounded ; and herein of the memorandum of damages.

4. Proceedings, where the damages required are unreasonable.

5. Proceedings when the owner neglects to pay damages and charges.

6. Proceedings when the owner is unknown.

7. Of impounding swine.

I. Of the duty of towns to maintain pounds, and the penalty for neglect of such duty.

By statute it is enacted, that there shall be kept and maintained in each town, at their proper cost and charges, a sufficient pound or pounds, in such place or places therein, as the town shall direct, who shall also appoint a suitable person to keep each pound ; wherein swine, sheep, horses, and neat cattle may be restrained and kept for the causes therein mentioned ; and any town that shall neglect to provide or maintain such pound for the space of six months, shall forfeit and pay to the use of the county, *ten pounds*, to be recovered by presentment by the grand jury.

Stat. 1788, c. 65, s. 1.

II. What creatures may be impounded ; and for what causes.

Field-drivers are empowered, to take up and impound any swine unyoked or unringed, horses unfettered, sheep

Ibid. s. 2.

For being at large in the high way at certain seasons of the year.

not under the care of a shepherd or going at large on the common or highways, leading through the town, between the fifteenth day of *April*, and the first day of *November*, and them in pound detain, or deal with according to law, until the owner shall pay for the use of the field-driver, *one shilling* a head, for all such horses, and *three pence* a head for all sheep and swine ; besides *two pence* a head for all such horses, and *one penny* for all sheep and swine, to the pound-keeper who may have the care of the particular pound in which they are restrained.

*Ibid.* s. 3.

For trespassing on land under improvement, and inclosed with a sufficient fence.

So any person injured in his tillage, mowing, or other lands under improvement, that are inclosed with a legal and sufficient fence, whether such lands be in a common or general field, or in a close by itself, by swine, sheep, horses, or neat cattle, may have and maintain an action of trespass, *quare clausum fregit*, against the owner of the cattle for his damages ; or he may impound the creatures doing the damage, or some of them at his election, with or without the aid of a field-driver ; and in case he impound the creatures, he may restrain them in one of the town pounds, or in some other place under his immediate care and inspection, as may be most convenient for relieving them with suitable meat and water ; which relief it shall be the duty of the person impounding, to furnish, or cause to be sufficiently furnished, during their confinement.

III. Of the notice to owners, whose creatures are impounded ; and herein of the memorandum of damages.

*Ibid.* s. 4.

Persons impounding to notify the owner of the beasts.

What notice is required where the owner is absent.

When any of the creatures aforesaid, shall be impounded, whether it be done for being at large out of the owners inclosure, or for doing damage as aforesaid, the person impounding shall inform the owner of the creatures impounded, (if known) within the space of twenty-four hours, by giving him a notification thereof in writing or otherwise ; and in case the owner of the creatures be absent, such written notification shall be left at his house

or usual place of abode, describing the creatures, and specifying the time, place, and cause of impounding. And the person impounding, shall also leave with the pound-keeper, if they are in the town or district pound, at the time such creatures are committed to his custody, a memorandum in writing under his hand, of the cause of impounding, and the sum he demands in damages from the owner, before they are liberated: and no action shall be maintained against the pound-keeper for detaining such creatures, until that sum, with his lawful fees, shall be paid.

Memorandum to be left with the pound-keeper.

Pound-keeper intitled to his fees.

IV. Proceedings, where the damages required are unreasonable.

If any person whose creatures are impounded, damage-feasant, shall think the damages mentioned in the memorandum, left with the pound-keeper, are unreasonable, he may have the same ascertained by two or more disinterested judicious persons, being thereto appointed and duly sworn by some justice of the peace, for the same county; or by the town clerk, where no justice of the peace is; which sum, thus ascertained, shall be taken instead of the sum first left with the pound-keeper.

Ibid.

Under proviso.

V. Proceedings when the owner neglects to pay damages and charges.

If the owner doth not, within twenty-four hours after notice as aforesaid, pay the damages and charges of impounding, or replevy the creatures, the party trespassed upon may apply to a justice of the peace or the town clerk, for a warrant, directed to two or more disinterested judicious persons; which warrant the town clerk of the same town, or any justice of the peace in the same county, may issue, and make returnable into the town or district clerk's office of the same town or district, as soon as the business is performed, and may also administer an oath unto the persons appointed, faithfully and impartially to

Ibid.

Party trespassed upon may apply for a warrant of appraisal.

Where such warrant is returnable.

Oath of the appraisers.

## IMPOUNDING.

Appraisal of the creatures.

Such creatures may be retained or sold at auction.

estimate the damage done the party injured ; and also to appraise so many of the creatures impounded, as shall be sufficient to answer the damages and all charges. And the party damnified, after the persons appointed as aforesaid, shall have ascertained the damage, and valued such of the creatures as shall be necessary to satisfy the same, and charges, and have made return of their warrant into the clerk's office, with their doings thereon, may retain and keep the creature or creatures so appraised, to his own use, or may sell the same at public vendue to the highest bidder, notice of such sale being posted up at some public place, within the same town or district, twenty-four hours before-hand ; and in either case returning the overplus, if any there be, to the owner, and shall liberate the remainder of the creatures impounded.

## VI. Proceedings when the owner is unknown.

Ibid.

But in case the owner of the creatures impounded, be unknown, the person impounding shall cause the same to be publicly cried, or notifications thereof as aforesaid, posted up in some public places in the town or district, and in the two next towns or districts adjoining, in case the distance thereunto from the place where the creatures may be taken up, doth not exceed four miles ; and if no owner or claimer appear within the space of three full days, next after the impounding and notifying as aforesaid, then the person so restraining them, may proceed with them in all respects as the law provides respecting strays, after having his damages ascertained, in case the cattle be taken damage-feasant, in manner as is before provided.

## VII. Of impounding swine.

Stat. 1788, c. 86, s. 1.

Choice of hog-reeves.

There shall be appointed, at the annual meeting in *March* or *April*, in each town, in this commonwealth, two or more persons for hog-reeves, who shall be chosen and sworn in the same manner as other town officers ; whose

duty it shall be to carry the regulations, made by the act, into execution ; and any person who shall suffer his swine to go at large out of his inclosure, shall forfeit and pay Penalty for swine going at large. *one shilling* for each swine thus suffered to go at large, to be recovered, with costs of suit, by any hog-reeve or other person, who will sue therefor, before any justice of How recoverable, and by whom. the peace, in the same county, by action of debt, or by impounding such swine. And when swine are impounded, to recover the penalty incurred by this act, the owner, if Notice to the owner of swine that are impounded. known, shall be notified in the time and manner by law directed, and if unknown, such notice of the time, place and cause of impounding, shall be given, as the law, in that case, hath directed ; and if no owner appear within three full days after the impounding, to pay the forfeiture and charges, and reasonable expense of keeping, or to replevy such swine, the impounder may, in writing, apply to a justice of the peace of the same county, or to the clerk of the same town, and there file an information Where the owner is unknown. of the transaction upon oath ; and if it shall appear from such information to the satisfaction of the justice or clerk, that such impounder has complied with the directions of the law in such cases, then said justice or clerk, may issue a precept in form, as is prescribed by law, to any constable of the same town, if the constable himself is not the impounder, or interested, and if he is, to any other discreet or disinterested inhabitant of the same town, to sell the swine, and after paying the impounder the fine, and costs, and expenses, to be taxed and allowed by the justice or clerk, to deliver the surplusage into the town Proceedings in case no owner appears within a limited time. treasury, there to remain for the owner, deducting Application to a justice, etc. *one shilling* on the pound for the treasurer's trouble, in case he shall appear and claim it within one year and a day from the time of issuing such precept ; but in case no owner appear within that time, such surplusage shall be Such justice, etc. may issue a precept for the sale of such swine. one half to the impounder, and the other half to the poor of the town, and be, by the treasurer, distributed accordingly. Surplusage to be paid into the treasury.

See Append. No. 7.

The form of the precept to be issued for selling swine impounded, to recover the forfeiture incurred by a breach of this act, is prescribed by the act.

Ibid. s. 3.

Swine may be permitted to go at large by vote of the town.

It is further enacted, that any town may, at the annual meeting in *March* or *April*, by a vote thereof, give liberty for swine to go at large during the whole or part of the year, in such town, or in such parts thereof, as the town shall determine most for the benefit of the inhabitants; in which case it shall be lawful for any person residing therein, to suffer his swine to go at large accordingly, without incurring the forfeiture aforesaid; any thing in this act contained to the contrary notwithstanding: *Provided*, such swine shall be sufficiently yoked from the fifteenth day of *April*, to the first day of *November*, and constantly ringed in the nose all the time they shall be permitted to go at large.

Swine to be sufficiently yoked.

Ibid. s. 4.

What is a sufficient yoking.

And that it may be known what a sufficient yoking doth mean, it is provided, that a yoke which is the full depth of the swine's neck, above the neck, and half so much below the neck, and the soal or bottom of the yoke full three times as long as the breadth or thickness of the swine's neck upon which it shall be placed, shall be deemed a sufficient yoking within the meaning of the act.

By an additional act, 1796, c. 70. Swine must be sufficiently yoked at all times, when permitted to go at large, as aforesaid, between the fifteenth day of *March*, and the first day of *December*, annually.

TITLE LXXXIII.

IMPRISONED DEBTORS.

1. **W**ITHIN what time a debtor imprisoned on *meane process* must be taken in execution.

2. Of the application of the debtor for the benefit of the statute for the relief of poor prisoners ; and the notice of such application to the creditor.

3. Of the admission of the debtor to the benefit of the act.

4. How far the creditors judgment against such debtor, is affected by the debtor's discharge.

5. How far the debtor, the town, and the collector, are affected by such proceedings, when the debt is for taxes.

6. Provision against frauds by debtors committed on execution.

I. Within what time a debtor imprisoned on *meane process* must be taken in execution.

No person, imprisoned upon mean process, shall be Stat. 1734, c. 24, s. 10. held in prison upon such process, above the space of thirty days next after the entering up final judgment upon the writ, whereby he is committed ; unless he shall be continued there by having his body taken in execution ; nor shall the prison-keeper discharge any such prisoner, unless judgment is given in his favour, until thirty days next after the said judgment is entered up, unless the party, at whose suit he was committed, shall give order, in writing, for his discharge, and shall pay the legal fees of the gaoler.

II. Of the application of the debtor for the benefit of the statute for the relief of poor prisoners ; and the notice of such application to the creditor.

Stat. 1787, c. 23, s. 1.

Persons committed for a private debt.

Application to a justice of the peace.

Notice to the creditor.

Service of the notification.

Service where the creditor lives out of the commonwealth.

When any person standing committed by force of any execution, issuing from any court in this commonwealth, on a judgment recovered by any person, shall complain, that he or she hath not estate sufficient to support him or her in prison ; the gaoler, or keeper of such prison, shall, on such complaint, apply to one of the justices of the peace, within and for the county in which such prison is, who shall thereupon make out a notification, in writing, under his hand and seal, thereby signifying to the creditor or creditors, such prisoner's desire of taking the privilege and benefit allowed in and by the act, and of the time and place allowed for the intended caption of the oath or affirmation allowed by the act, and which being served on the creditor or creditors of the said prisoner, if he, she, or they live within this commonwealth, his or her executor or administrator, and if such creditor or creditors live out of this commonwealth, upon his or their agent or attorney, who brought forward the suit on which the judgment whereon the execution, by which the prisoner stands committed, was rendered, by the sheriff, or his deputy, of the county in which the service shall be made, either by reading the same to him or her, or by leaving an attested copy thereof at the usual place of abode of such creditor or creditors, agent or attorney as aforesaid, at least thirty days before the time appointed for taking the said oath or affirmation, that he, she or they may be present, if they see cause. *Provided*, that if any creditor or creditors live out of this commonwealth, and have no agent or attorney, as aforesaid, living in the same, an attested copy of such notification shall be left with the clerk of the court, or the justice by whom the execution was signed, at least fifty days before such intended caption.

So by stat. 1789, c. 9. any person standing committed on an execution issued upon a confession, before any justice of the peace, agreeable to law, shall be entitled to all the benefits allowed by the act for the relief of poor debtors.

Persons committed on execution issuing from a confession.

So when any person standing committed to prison, by virtue of any warrant for the collection of any tax, rate or assessment, shall complain that he or she hath not estate sufficient to support him or herself in prison ; the gaoler or keeper of such prison shall, on such complaint, apply to one of the justices of the peace, within and for the county in which such prison is, who shall thereupon make out a notification in writing, under his hand and seal, thereby signifying to the assessors of the town, district, plantation or parish, where such tax, rate or assessment was made, and also to the constable or collector who executed such warrant, such prisoner's desire of taking the privilege and benefit, and the time and place appointed for the intended caption of the oath or affirmation allowed by the act ; which notification shall be served on such assessors and constable or collector, by leaving an attested copy thereof at the office of such assessors, or at the usual place of abode of any one of them ; and also at the usual abode of such constable or collector, at least thirty days before the time appointed for the taking said oath or affirmation, that they may be present, if they see cause.

Stat. 1790, c. 42, s. 1.

Persons committed for taxes.

Application to a justice of the peace.

Notification to the assessors, etc.

Service of the notification.

III. Of the admission of the debtor to the benefit of the act.

Any two justices of the peace within and for the county where such caption is, each of whom shall be of the quorum, and disinterested ; and not related either to the creditor or debtor, are authorized and impowered, at the time and place appointed for the taking such caption, to examine the return of the said notification ; and if it shall appear to be duly made, to administer the oath or affir-

Stat. 1787, c. 22, s. 2.

required of such town, plantation or district, by law; such liberation notwithstanding.

*Ibid.* s. 6.

Collector liable to answer for the tax in certain cases.

So when any person, who shall be imprisoned for the non-payment of any proportion of any tax, shall be discharged from confinement, by virtue of the act, the collector or constable making such imprisonment, shall not be discharged from the proportion which was due from such person, but shall be holden to pay the same; unless such imprisonment shall be made within one year, next after the commitment of such tax to such collector or constable, or unless the inhabitants of such town or place, in legal town meeting, shall see fit to abate the same, to such collector or constable.

VI. Provision against frauds by debtors committed on execution.

Stat. 1788, c. 16, s. 3.

By statute it is enacted, that whenever a debtor in execution, having goods, effects or credits, to the amount of *ten pounds* or more, (that are unattachable by the common and ordinary process of law) shall spend or use the same, or so much thereof for his subsistence, as shall amount to the sum upon which he was committed in execution, without giving the creditor, his agent, factor or attorney notice where and of what kind they are, and enabling him, if he thinks proper, to accept the same, or such part of them, as will amount to the debt, for which he is in execution, in satisfaction thereof; such neglect shall be deemed and taken, as a fraudulent transaction in the debtor; and every person who shall knowingly aid and assist a debtor, in such fraudulent transaction, shall be answerable and chargeable to the creditor, to double the full value of the money, goods or effects, by him or them thus secreted, spent or embezzled, in a special action on the case.

TITLE LXXXIV.

INDICTMENT.

**A**n indictment is a written accusation, of one or more persons, of a crime or misdemeanour, presented upon oath by a grand jury. This jury consists of twelve at the least, and not more than twenty-three ; that twelve may be a majority. To find a bill, there must at least twelve of the jury agree : but if twelve agree, it is a good presentment, though the rest disagree. The indictment, when so found, is publicly delivered into court.

<sup>4</sup> Bl. Com. 303. 306.

1. What offences are indictable.
2. The time within which a prisoner, committed for a capital offence, shall be indicted.
3. The time within which a prisoner, under indictment, shall be tried.
4. Within what place the offence must arise.
5. How the indictment ought to set forth the substance and manner of the fact.
6. How the indictment must set forth the persons mentioned or referred to in it.
7. Where the offence may be laid jointly, and where both jointly and severally ; and where the offences of several persons may be laid in one indictment.
8. Of pleading, standing mute—challenges.
9. Of the verdict.

I. What offences are indictable.

Not only capital offences, such as treasons and felonies, are indictable, but all other crimes, being of a public nature and *mala in se*, though of an inferior kind ; as misprision, disturbances of the peace, oppressions, and all

<sup>3</sup> Bac. Abr. 96.

other misdemeanors whatsoever of a public evil example, against the common law, may be indicted.

*Ibid.*

Also, generally, where a statute either prohibits a matter of public grievance, or commands a matter of public convenience, every disobedience of such statute is indictable.

*Ibid.* 97.

But where a statute creates a new offence, which was no way prohibited by the common law, and appoints a particular mode of proceeding against the offender, as by commitment, or action of debt, or information, &c. without mentioning an indictment, such statute will not maintain an indictment, because the mentioning the other methods of proceeding only, seems impliedly to exclude that of indictment.

*Ibid.*

Where a statute adds a new penalty to an offence prohibited also by the common law, it is in the election of the prosecutor to proceed either at common law or on the statute; and if he conclude his indictment "*against the form of the statute,*" and cannot make it good as an indictment on the statute, yet if the indictment be good as an indictment at common law, it shall stand as such, and the words, "*against the form of the statute*" shall be rejected.

2 Burr. Rep. 1122,  
1130.

In all such impositions or deceits, where common prudence is sufficient to guard a person from suffering, the offence is not indictable, but the injured party is left to his civil remedy; but where such methods are taken to cheat and deceive, as a person cannot by ordinary care or prudence be guarded against, there it is an offence indictable, as false weights and measures, or false tokens.

By the court, in  
Commonw. v. Judd  
et al.  
2 Mass. Rep. 377.

"The gist of a conspiracy being the unlawful confederacy to do an unlawful act, or even a lawful act for unlawful purposes, the offence is complete," and, therefore, indictable, "when the confederacy is made; and any act done, in pursuance of it, is no constituent part of the offence, but merely an aggravation of it."

II. The time within which a prisoner, committed for a capital offence, shall be indicted.

By statute it is enacted, that any person, who shall be held in prison upon suspicion of having committed a crime, for which he may have sentence of death passed upon him, shall be bailed or discharged, if he is not indicted at the second term of the sitting of the supreme judicial court in the county where the offence is alleged to have been committed, where there are two terms a year in such county : and in such counties as have but one supreme judicial court in a year, the defendant shall be bailed or discharged, if he is not indicted at the first term ; provided such person shall have been held in prison for the space of six months next preceding the day of the court's sitting. <sup>Stat. 1784, c. 72, s. 1?</sup>

III. The time within which a prisoner, under indictment, shall be tried.

When any person shall be held in prison, under indictment, he shall be tried or bailed at the first term next after his indictment, if he demands the same, unless it shall appear to the court that the witnesses, on behalf of the government, have either been enticed away, or are detained by some inevitable accident, from attending. And all persons under indictment for felony, shall be bailed or tried at the second term after the bill shall be returned, if they demand it. <sup>Ibid.</sup>

IV. Within what place the offence must arise.

The grand jury cannot regularly indict or present any offence which does not arise within the county or precinct for which they are returned. And, therefore, it is generally a good exception to an indictment, that it doth not appear that the offence arose within such county or precinct. <sup>3 Bac. Abr. 98.</sup>

Yet if larceny be committed in one county, and the goods are carried into another, the offender may be indicted in either ; for the offence is complete in both. <sup>4 B<sup>1</sup>. Com. 405.</sup>

*Commonw. v. Collins,*  
1 Mass. Rep. 116.

So if a person, stealing goods in another state, brings them into this state, he may be indicted here.

*Commonw. v. Andrews,*  
4 Mass. Rep. 14.

So if goods are stolen in another state, and brought into this, an indictment lies against the receiver of them in this state.

4 Bl. Com. 305.

But for robbery, burglary and the like, the offender can only be indicted where the fact was actually committed.

Stat. 1795, c. 45, s. 1.

So by statute, where any person shall be feloniously stricken, poisoned or injured in one county in this commonwealth, and die of the same stroke, poisoning or injury, in another county thereof, an indictment thereof found by the grand jurors of the county where the death shall happen, before the justices of the supreme judicial court, there held, shall be as good and effectual, in law, as if the stroke had been given, or poisoning or injury done in the same county where the party shall die, or where the said indictment shall be found.

*Ibid.* s. 3.

Furthermore, by the same statute, where any person shall be feloniously stricken, poisoned or injured, on the high seas, and without the limits of this commonwealth, and die of the same stroke, poisoning or injury in any county thereof, an indictment thereof, found by the grand jurors of the county where the death shall happen, before the justices of the supreme judicial court there held, shall be as good and effectual in law as if the stroke had been given, or poisoning or injury done, in the same county where the party shall die.

V. How the indictment ought to set forth the substance and manner of the fact.

3 Bac. Abr. 100.

In indictments, the special manner of the whole fact ought to be set forth with such certainty, that it may judicially appear to the court that the grand jury have not gone upon insufficient premises.

4 Bl. Com. 306, 307.

In some crimes, particular words of art must be used, which are so appropriated by the law, to express the idea

which it entertains of the offence, that no other words however synonymous they may seem, are capable of doing it. Thus, in treason, the facts must be laid to be done "*treasonably, and against his allegiance.*" In indictments for murder, it is necessary to say that the party indicted "*murdered,*" not "*killed*" or "*slew,*" the other. In all indictments for felonies, the adverb, "*feloniously*" must be used; and for burglaries also, "*burglariously:*" and all these to ascertain the intent. In rapes, the word "*ravished*" is necessary, and must not be expressed by any periphrasis; in order to render the crime certain. So in larcenies also, the words "*feloniously took and carried away,*" are necessary to every indictment; for these only can express the very offence. Also in indictments for murder, the length and depth of the wound should, in general be expressed, in order that it may appear to the court to have been of a mortal nature: but if it goes through the body, then its dimensions are immaterial, for that is apparently sufficient to have been the cause of the death. Also where a limb or the like, is cut off, there such description is impossible.

In an indictment for forgery, stating an instrument to be "*in the words and figures following,*" a strict recital is necessary. 1 Mass. Rep. 54.

But the *number* of a bank note, and the *figures* in the margin of it, need not be set out in the indictment; they not being a part of the note. Ibid. 62, 203.

In an indictment for stealing money the value must be averred. Ibid. 245.

In an indictment for stealing a bank note, it is sufficient to allege the amount and value, without a more particular description. Ibid. 337.

An indictment, for uttering a forged promissory note, need not set forth the date of the note, nor the time when the money was made payable. 2 Mass. Rep. 373.

So an indictment for forging a promissory note need not allege the indorsement of the note, though it be forged. It is not part of the note. Ibid. 397.

*Ibid.* 536.

In an indictment for a conspiracy to accuse one of a crime, it is not necessary to allege, that the defendants procured, or intended to procure an indictment, or other legal process.

*Ibid.*

So the conspiracy being the gist of the offence, and acts done in pursuance of it being only matter of aggravation, any informality or uncertainty in alleging such acts, will not vitiate the indictment.

3 Mass. Rep. 126.

When a receiver of stolen goods is indicted for a misdemeanor only, under the statute the indictment should allege that the principal offender is not known or prosecuted.

3 Bac. Abr. 101.

An indictment of perjury, not shewing in what manner, and in what court, the false oath was taken, is insufficient, for, aught that appears, it might have been extra-judicial.

*Ibid.*

Also an indictment accusing a man in general terms, without ascertaining the particular fact laid to his charge, is insufficient; for no one can know what defence to make to a charge which is uncertain; nor can he plead it in bar or abatement of a subsequent prosecution; neither can it appear, that the facts given in evidence against a defendant on such a general accusation, are the same of which the indictors have accused him; nor can it judicially appear to the court, what punishment is proper for an offence so loosely expressed.

*Ibid.*

But barratry, being an offence of a complicated nature, consisting in the repetition of frequent acts, all of which it would be too prolix to enumerate, it is sufficient that an indictment charge a man generally, as a common barrator.

*Ibid.*

So an indictment must lay the charge against the defendant *positively*, and not by way of recital; and it must expressly allege every thing material in the description of the substance, nature, and manner of the crime; for no indictment shall be admitted to supply a defect of this kind. Therefore, if an indictment of murder wants

the words "of *malice aforethought*," such omission will be fatal.

There is no necessity for an indictment or information on a public statute, to recite such statute, whether the offence be *malum prohibitum*, or *malum in se*, or whether it be prohibited by one statute only, or by more than one; for the judges must, *ex officio*, take notice of all public statutes. <sup>3 Bac. Abr. 111.</sup>

But although it be not necessary to recite a public statute, yet if a prosecutor take upon himself to recite a statute, and materially vary from it, and conclude "*against the form of the statute aforesaid*," he vitiates the indictment; because it judicially appears, that there is no such foundation as that whereon it is expressly grounded. <sup>Ibid.</sup>

A judgment on a statute shall never be given on an indictment, which doth not conclude "*against the form of the statute*;" and, therefore, if the fact indicted be an offence prohibited only by statute, and the indictment conclude not "*against the form of the statute*," no judgment can be given on it. <sup>Ibid. 114.</sup>

VI. How the indictment must set forth the persons mentioned or referred to in it.

The name and addition of the party indicted ought regularly to be inserted, and inserted truly, in every indictment. <sup>Ibid. 103.</sup>

But if the party be indicted by a wrong christian name, surname, or addition, and he plead to that indictment, "*not guilty*," or answer to the indictment upon his arraignment by that name, he shall not afterwards, be allowed to plead a misnomer of his addition. <sup>Ibid.</sup>

The addition ought to be to the substantive name, and not to that which comes after the *alias dictus*, because, regularly, the addition refers to the last antecedent. <sup>Ibid. 104.</sup>

There is no need of an addition of the person robbed or murdered, unless there be a plurality of persons of the same name; neither then is it essential to the indict- <sup>Ibid.</sup>

ment, though sometimes it is convenient, for distinction's sake, to add it ; for it is sufficient, if the indictment be true, viz. that J. S. was killed or robbed, though there are many of the same name.

VII. Where the offence may be laid jointly, and where both jointly and severally ; and where the offences of several persons may be laid in one indictment.

Wid. 108.

Although the offences of several persons cannot but be several, because one man's offence cannot be another's, but every man must answer for himself ; yet if it wholly arise from a joint act, which is in itself criminal, as where several join in keeping a *house of ill fame*, &c. the defendants may be indicted jointly and severally, or jointly only.

Ibid.

And as several persons may be joined in the same indictment, so several offences committed by the same party may be joined in one indictment ; as burglary and larceny, larcenies committed of several things, though at several times, and from several persons, may be joined in one indictment.

VIII. Of pleading, standing mute—challenges.

2 Mass. Rep. 173.

A *nolle prosequi* entered on an indictment, is no bar to another indictment for the same offence.

Commonwealth v. Battle,  
1 Mass. Rep. 95.

In an indictment for a capital crime, if the prisoner pleads "*guilty*," the court will not direct an immediate entry of the plea, but will give a reasonable time to the prisoner to consider of the same, that he may, if he think proper retract it.

Stat. 1777.

See 3 Vol. Mass. Laws, Thomas's Ed. Append. p. 226.

By the statute of treasons, if any person indicted for treason, or misprision of treason, and being arraigned thereon, shall stand mute, a jury shall forthwith be impannelled and sworn to try and say, whether the person, so standing mute, standeth mute by the providence and act of God, or fraudulently, wilfully, and obstinately ; and if they shall return their verdict, that he standeth mute

by the providence and act of God, the court shall thereupon cause him to be remanded to prison, and shall not proceed against him, until he shall have recovered therefrom ; but if the jury shall return their verdict, that the prisoner so standing mute, standeth mute fraudulently, wilfully, and obstinately, then the court shall cause to be entered upon the indictment against the prisoner, the plea of "*not guilty*," and shall proceed upon his trial in like manner, in all respects, as if the prisoner had voluntarily pleaded the same plea thereto, and put himself upon God and the country for his trial, except that the prisoner shall not be admitted to make any challenges to the jurors.

So by statute 1795, c. 45, s. 3. If any person shall be indicted of any offence, except treason, against this commonwealth, for which the punishment is or shall be declared to be death, and shall stand mute, and refuse to plead ; the court shall proceed to the trial of the person so standing mute, in the same manner, as if he or she had pleaded not guilty, and render judgment accordingly.

In the case of *Commonwealth v. Braley*, in which the prisoner, who was indicted for murder, neglected to plead ; the court did not proceed to try him on the indictment, but a jury was impannelled to try the fact, whether the prisoner's neglect to plead, resulted from his free will, or from the act of God ; and the jury having found it to be the act of God, the prisoner was remanded.

<sup>1</sup> Mass. Rep. 104.

In capital offences the prisoner is allowed to challenge peremptorily, twenty jurors, and no more.

Stat. 1777 and 1795,  
c. 43, s. 3.

#### IX. Of the verdict.

If an indictment be grounded on a statute, and the crime is not brought by the terms of the verdict within the statute, but is an offence at common law, the court are bound to animadvert upon it, and may sentence the prisoner.

*Commonwealth v. Boynton*,  
<sup>2</sup> Mass. Rep. 78,

## INDICTMENT.

By the statute of larcenies, 1784, c. 66, s. 11. When any person shall be indicted for any high and aggravated crime or misdemeanor by the grand jury, and upon trial of the issue, it shall appear to the petit jury, that the person accused is not guilty of the whole crime charged in the indictment, but is guilty of so much thereof, as shall substantially amount to a crime of a lower nature, the petit jury may find the indicted person guilty of such part only, and not guilty of the whole indictment. And the court shall proceed to sentence such convict, for the crime of which he is found guilty, according to law.(1)

(1) This statute is repealed by stat. 1805, c. 88. But Parsons, Ch. J. in *Commonwealth v. Boynton*, 2 Mass. Rep. 79, (as appears by a note of the Reporter,) remarked that the above quoted provision was merely in affirmance of the common law.

TITLE LXXXV.

INFANCY.

**F**ULL age, in male or female, is twenty-one years; which age is completed on the day preceding the anniversary of a person's birth; who, till that time, is an infant, and so styled in law. <sup>1 Bl. Com. 463.</sup>

1. The general privileges and disabilities of infants.
2. The liability of infants for necessities.

I. The general privileges and disabilities of infants.

Infants have various privileges and various disabilities: But their very disabilities are privileges; in order to secure them from hurting themselves by their own improvident acts. <sup>Ibid. 464.</sup>

Generally, an infant cannot be sued but under the protection, and joining the name of his guardian; for he is to defend him against all attacks, as well by law as otherwise. (1) And if judgment be rendered against an infant, by default, without having a guardian appointed for him, such judgment will be erroneous. <sup>Ibid.</sup> <sup>Bartlet v. Knight, 1 Mass. Rep. 401. Knap v. Crosby, 1 Mass. Rep. 489.</sup>

But an infant may sue, either by his guardian or next friend who is not his guardian. This next friend may be any person of full age who will undertake the infant's cause.

In criminal cases an infant of the age of *fourteen* years may be capitally punished for any capital offence: but <sup>4 Bl. Com. 464.</sup>

(1) An infant may be sued for non-appearance at a military muster, and may answer *personally*, as in case of an indictment.

Winslow v. Anderson, 4 Mass. Rep. 376.

under the age of *seven*, he cannot. The period between *seven* and *fourteen* is subject to much uncertainty : for the infant shall, generally speaking, be judged *prima facie* innocent ; yet if he was *doli capax*, and could discern between good and evil, at the time of the offence committed, he may be convicted, and undergo judgment and execution of death, though he hath not attained to years of puberty or discretion. The capacity of doing wrong or contracting guilt, is not so much measured by years and days, as by the strength of the delinquent's understanding and judgment. For one lad of eleven years old may have as much cunning as another at fourteen ; and in these cases, the maxim is, that *malice supplies the want of age*. But the evidence of that malice, which is to supply the want of age, ought to be strong and clear beyond all doubt and contradiction.

4 Bl. Com. 22.

So where there is a notorious breach of the peace, a riot, battery, or the like, (which infants when full grown, are at least as liable as others to commit) for these, an infant, above the age of fourteen, is equally liable to suffer, as a person of the full age of twenty-one.

1 Bl. Com. 465.

With regard to estates and civil property, an infant hath many privileges. He shall lose nothing by non-claim or neglect of demanding his right ; nor shall any other *laches* or negligence be imputed to him, except in some very particular cases.

Ibid.

It is generally true, that an infant can neither aliene his lands, nor do any legal act, nor make a deed, nor indeed any manner of contract, that will bind him. But to this rule there are some exceptions.

Ibid. 466.

An infant may purchase lands, but his purchase is incomplete : for when he comes to age, he may either agree or disagree to it, as he thinks prudent or proper, without alleging any reason ; and so may his heirs after him, if he dies without having completed his agreement. So an infant may, in some cases, bind himself by deed indented or indentures, for seven years ; and he may by

deed or will, appoint a guardian for his children, if he has any. So an infant may bind himself to pay for his necessary meat, drink, apparel, physic, and such other necessities; and likewise for his good teaching and instruction, whereby he may profit himself afterwards.

Though an infant cannot generally, by his assent, bind himself to a specific contract, except for necessities, yet his incapacity does not render contracts entered into with him, if there be any semblance of benefit to arise to him thereby, void or voidable by the party contracting with him; for though the infant has this privilege, yet the party with whom he contracts has it not; for the latter knows with whom he contracts, and therefore shall not be relieved against his own folly; nor shall that be turned to the prejudice of the infant, which the law designed as a protection and security to him against all disadvantageous contracts.

<sup>1</sup> Pow. Contr. 37, 38.

As in this case, which was a promise of marriage. The defendant pleaded, that the plaintiff, at the time of the promise, was an infant: and it was contended, that the plaintiff not being bound equally with the defendant, this was *nudum factum*, and that therefore the defendant could not be charged in the action. But the court were of opinion, that as marriage was then looked upon to be an advantageous contract, the agreement was not void, but voidable at the election of the infant; and that as to the person of full age, it was absolutely binding.

Holt v. Clarensieux,  
Str. 937.

<sup>1</sup> Pow. Contr. 39.

## II. The liability of infants for necessities.

The general rule, in the case of infants is, that they are liable on no contracts, except for *necessaries*, as meat, drink, education, clothes, &c.

<sup>1</sup> Esp. Dig. 169.

But necessities for an infant's wife are necessities for himself, and he shall be liable; but if furnished *in order for the marriage*, he is not liable; for she was not *then* his wife, nor the goods furnished on his credit.

Turner v. Frisby,  
<sup>1</sup> Stra. 158.

1 Esp. Dig. 170.

So if one under age contracts for the nursing of his child, it shall be deemed a lawful contract, and he shall be liable.

*Ibid.*

So if a lease be made to an infant, and he occupies and enjoys under such a lease, he is chargeable for the rent incurred during the time he continues in possession.

But these cases suppose the infant not to be under the power of the parent.

*Estabridge v. Pickering*,  
2 Bl. Rep. 1325.

For if an infant lives with his parents, and is maintained by them, he is not liable for any thing furnished to him, even though they might otherwise be deemed necessities; for the parent is the proper judge of what are necessities.

*Earle v. Peete*,  
Saek. 380.

But though an infant is liable on his contract for necessities, yet if one *lends money* to an infant, even to pay for necessities, the infant is not liable; for it may be misapplied, and, therefore, the law will not trust him with the expenditure; but it is at the peril of the lender: Besides the assumpsit is founded on the *lending*, not on the *application*.

1 Esp. Dig. 171.

So that if the plaintiff proved that the money was lent to pay for necessities, and *applied to that purpose*, he might be entitled to a verdict: but in such case, the defendant should rejoin and take issue on the expenditure.

*Whittingham v. Hill*,  
Cro. Jac. 491.

Goods furnished to an infant, in the way of his *trade*, are not necessities, and, therefore, he is not liable; for the law will not allow him to trade, which may ruin him.

*Southerton v. Whitlock*,  
1 Stra 600.

But though an infant is thus exempted from all demands, except for necessities, yet if goods, *not necessities*, have been delivered to an infant, and after his coming of age, he promises to pay for them, he thereby ratifies the contract and shall be bound to pay. And what amounts to such confirmation shall be matter to be left to the jury.

And where to a plea of infancy plaintiff replies, that the defendant had ratified his promise after coming of age, and defendant rejoins, that he had not so ratified his promise after full age, upon which issue is joined; it is sufficient for plaintiff to prove the promise, and the proof that defendant *was not then of full age* lies upon defendant, though the assertion, *that he was of full age*, makes part of plaintiff's replication; for whether of age or not, is a matter which lies within defendant's own knowledge, and not within the plaintiff's.

*Borthwick v. Carruthers.*  
1 T. R. 642.

TITLE LXXXVI.

INNOLDERS AND RETAILERS OF SPIRITUOUS LIQUORS.

1. **O**r original licenses.
2. Of the renewal of licenses.
3. Of the time of granting licenses.
4. Duty of the sessions relative to licenses.
5. Of the recognizance of persons licensed.
6. Duty of selectmen, relative to licensed houses.
7. Duty of innholders to make suitable provision for the entertainment of travellers.
8. Penalty incurred by an innholder, who allows reveling or tippling in his house.
9. Innholders prohibited trusting a townsman beyond the sum of *ten shillings*.
10. Liability of those who, not being licensed, presume to be innholders, or presume to sell any strong or mixed liquors.
11. Penalty for a second or third breach of the act relative to licensed houses; the mode of prosecution for a breach of the act; the appropriation of fines, and the punishment when the delinquent omits to pay his fine.

I. Of original licenses.

Stat. 1786, c. 68, s. 2. No person shall be firstly or originally licensed to be a victualler, innholder, taverner, or seller of wine, beer, ale, cyder, brandy, rum, or other strong liquors, by retail, in the town or district where he lives, other than such as produce a certificate from the selectmen of the same town or district, recommending them in form, as prescribed by law.

Form of certificate,  
See Append. No. 10.

## OF SPIRITUOUS LIQUORS.

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So he must take an oath of allegiance.

So the justices of the courts of general sessions of the peace in the several counties in this commonwealth, are authorized and directed to grant license as the law directs, for keeping a tavern, or for retailing spirituous liquors, to any person applying for such license within their respective counties, who may be an inhabitant or resident in any plantation or other place, not within the limits of any incorporated town or district, on such person's taking the oath required by law to be taken, by persons previous to their receiving license, and producing satisfactory evidence to the court, to which he shall apply, that he is firmly attached to the constitution and laws of this commonwealth, and well qualified and provided for the exercise of such an employment, and that such license will be subservient to the public good.

Form of oath.  
See Append. No. 11.  
Stat. 1793, c. 25.

### II. Of the renewal of licenses.

All licenses shall be renewed yearly; and it is enacted, that the clerk of the peace in the respective counties, from time to time, annually, before the granting licenses, shall transmit to every town and district within the county, a list of the names of the persons in such town or district, that were licensed the year before; and that licenses shall not be renewed to any person borne on such list, unless the selectmen of such town or district, shall have considered the same, and made return thereof to the clerk of the peace, certifying thereon, "*that they have maturely considered the same, and to the best of their knowledge, the following persons, named therein, have maintained good rule and order in their respective houses or shops, and have conformed to the laws and regulations respecting licensed persons, and are firmly attached to the constitution and laws of this commonwealth.*" And no person shall have his license renewed, unless his name be inserted in such certificate, or in another of the same tenor.

Stat. 1786, c. 68, s. 2.

Clerk to transmit to the selectmen, a list of persons licensed the preceding year.

Selectmen to return the same, with a certificate.

Such certificate necessary, to entitle one to a renewal of his license.

*Ibid.*

Persons prosecuted for certain offences in regard to their houses not entitled to a renewal of their licenses.

So no license shall be renewed to any person, who shall have been before licensed, against whom any presentment, complaint, or information shall be made for misrule or disorder in such house, or for not being suitably provided, as the law in such case requires, to entertain strangers and travellers at bed and board, before the matter complained of and informed against be inquired into and judged of. *Provided*, such presentment or complaint be prosecuted to effect, at or before the same court for granting such licenses; unless the prosecution be delayed at the motion of the person applying for the license.

### III. Of the time of granting licenses.

*Ibid.* s. 13.

Usual time of granting licenses.

In what cases licenses may be granted out of the usual time.

The time of granting licenses to innholders and retailers as aforesaid, shall be at the first general sessions of the peace that shall be held in course within the several counties on, or next after the last Tuesday in *June*, annually; unless, upon application made to the general sessions of the peace, at any of the terms stated by law for holding said court, and on such day and time of the sitting of such court, as the justices of the same are wont to give their more general attendance, for license to keep an inn, tavern, a house of public entertainment, or to retail strong liquors, it shall appear to the same court, that the person applying was unavoidably prevented from making application at the said first general sessions of the peace, or that the necessity of such license had taken place since that time; and in either case, that the public good makes it necessary that the same should be granted; in which case the said justices are empowered to grant the same, as though it was at the proper term for granting licenses, the person applying for such license paying therefor, for the use of the county, *six shillings*, over and above the usual fees and duties.

Extra sum to be paid by the person licensed.

*Ibid.* s. 14.

When it shall so happen, that any licensed innholder or retailer shall die, before the year is expired, for which

license shall have been granted, and the widow of the deceased, if such there be, or children, or other representative, shall desire to exercise said employment, in such licensed house, the remainder of the year; and where any licensed innholder or retailer shall remove from a licensed house, and the purchaser or occupier of such house shall petition to be licensed, to be an innholder or retailer in the same house for the remainder of the year; in every such case, it shall be lawful, and the justices of the court of general sessions of the peace are empowered, at any of the terms appointed by law for holding the same in such county, and any two justices of the peace, *quorum unus*, are also empowered to grant licenses to such person or petitioner applying therefor, the remainder of the year. *Provided*, such person be suitably qualified therefor; and recommended as the law directs.

New licensees may be granted where an innholder, etc. shall die, or remove before the expiration of the year.

#### IV. Duty of the sessions relative to licenses.

The justices of the general sessions of the peace, in each county, are directed, not to license more persons in any town or district to keep houses of common entertainment, or to retail spirituous liquors, as aforesaid, than the justices shall judge necessary for the receiving and refreshment of travellers and strangers, and to serve the public occasions of such town or district, or are necessary for the public good: and all public houses shall be on or near the high streets, roads, and places of great resort.

*Ibid.* s. 14.

No more persons to be licensed than are necessary for the public good.

#### V. Of the recognizance of persons licensed.

Before any person shall receive a license to be an innholder, taverner, victualler, or retailer of spirituous liquors, every such person shall become bound by recognizance to the commonwealth in the sum of *twenty pounds*, as principal, with two sureties in *ten pounds* each, before one or more justices of the general sessions of the peace,

*Ibid.* s. 10.

on condition, "that during the time for which he is licensed, he shall keep and maintain good order and rule, and shall suffer no disorders, nor unlawful games to be used in his said house, or in any of the dependencies thereof, and shall not break any of the laws for the regulation of such houses."

*Ibid.*

And before any person shall receive license to be a retailer of strong liquors, to be spent out of his house, and not otherwise, such person shall become bound in recognizance, as aforesaid, on condition that he do not break the laws made for the regulation of such retailers, and shall do and observe the directions of the law relating to such licenses.

*Ibid.* s. 11.

*Scire facias* may issue on the default of the cognizers.

Upon default being made upon any such recognizance, a *scire facias* shall issue, and judgment and execution be had in the usual form. And no recognizance for the keeping the laws respecting the above mentioned licenses, shall be put in suit for any breach thereof made, after the expiration of two years from the time of taking such recognizance.

#### VI. Duty of selectmen, relative to licensed houses.

*Ibid.* s. 2.

To make a certificate annually,

It shall be the duty of the selectmen in the several towns, annually, to certify to the court of the general sessions of the peace, at the beginning of their term for granting licenses, what number of innholders and retailers, in their respective towns, they judge to be necessary for the public good.

*Ibid.* s. 16.

To cause the names of drunkards, etc., to be posted.

The selectmen in each town shall cause to be posted up in the houses and shops of all taverners, innholders, and retailers, as aforesaid, within such towns or districts, a list of the names of all persons reputed common drunkards, or common tipplers, or common gamblers, mispending their time and estate in such houses.

*Ibid.* s. 17.

To prohibit the sale of liquors to persons of a certain description,

Whenever any person shall, by idleness, or excessive drinking of spirituous liquors, so mispend, waste, or lessen his or her estate, as thereby either to expose him-

self or herself, his or her family, to want or indigent circumstances, or the town to which he or she belongs, to a charge or expense for the maintenance or support of him or her, or his or her family, or shall so indulge him or herself in the use of spirituous liquors, as thereby greatly to injure his or her health, or endanger the loss thereof, such selectmen, shall in writing, under their hands, forbid all licensed persons, in their respective towns and districts, to sell to any of the fore-described mispenders of time and estate, any spirituous or strong liquors, in this act mentioned, for the space of one year, and shall, in like manner, forbid the licensed persons of any other town or district to which such mispender may resort for the same. And if any of the persons contained in the said prohibition, shall not in the opinion of the said selectmen, or the major part of them, have reformed during the said year; in such case, the selectmen of such town or district shall renew the prohibition in manner as aforesaid.

VII. Duty of innholders to make suitable provision for the entertainment of travellers.

All innholders, taverners, and common victuallers, shall, at all times, be furnished with suitable provision and lodging, for the refreshment and entertainment of strangers and travellers, pasturing and stable-room, hay and provender, (saving that in populous sea-port towns, stable-rooom, hay, and provender only are required) for their horses and cattle, on pain of being deprived of their license. And every licensed victualler, innholder, or taverner, shall at all times have a board or sign affixed to his or her house, or in some conspicuous place near the same, with his or her name at large thereon, and the particular employment for which he or she is licensed: and if any victualler, innholder, or taverner, enjoined by law to be suitably provided to receive and entertain strangers, travellers, and others, as occasion may require, shall be

*Ibid.* s. 3.

Innholders, etc. to be suitably provided, &c. &c.

To put up a sign.

Penalty for refusing  
to make suitable pro-  
vision for travellers.

convicted of refusing to make suitable provision, when desired, for the receiving of strangers, travellers, and their horses and cattle, or for any public entertainment, such person, upon being convicted thereof, before the justices of the general sessions of the peace of the county, to which such person belongs, shall, by the said justices, be deprived of his or her license; and the said justices are empowered and directed to order the sheriff of the same county, or his deputy, to cause the sign of such convicted person to be taken down.

VIII. Penalty incurred by an innholder, who allows revelling or tippling in his house.

*Ibid.* s. 6.

No taverner, innkeeper, or victualler, shall suffer any dancing or revelling in his house, or the dependencies thereof, on penalty of *thirty shillings*, to be paid by the master or keeper of the the said house, who shall suffer the same, and the penalty of *six shillings*, to be paid by each person offending in any of the said particulars.

*Ibid.* s. 7.

So no taverner, innholder, or victualler, shall suffer any person to drink to drunkenness or excess, in his or her house, or suffer any minor, (travellers excepted,) or servant to sit drinking there, without special allowance from their respective parents, guardians, or masters, on pain of forfeiting the fine of *twenty shillings* for every offence of that kind.

*Ibid.* s. 16.

So where the selectmen in any town, &c. publish a list of all persons reputed common drunkards, &c. pursuant to the statute, every keeper of such house or shop, after notice given him, as aforesaid, that shall be convicted before one or more justices of the peace, of entertaining or suffering any of the persons in the list, to drink or tipple, or game, in his or her house, or any of the dependencies thereof, or of selling them spirituous liquors, as aforesaid, shall forfeit and pay the sum of *thirty shillings*.

*Ibid.* s. 17.

So when the selectmen shall, in writing, forbid all licensed persons in their respective towns, &c. to sell to

any mispenders of time, &c. any spirituous liquors, pursuant to the statute; if any licensed victualler, taverner, innholder, or retailer of spirituous liquors, shall, during any such prohibition, sell, to any person contained therein, any spirituous liquors in the act mentioned, he shall forfeit and pay for each offence the sum of *twenty shillings*, to the use of the town or district where such mispender lives, to be sued for and recovered by the treasurer of such town or district.

IX. Innholders prohibited trusting a townsman beyond the sum of *ten shillings*.

If any innholder, retailer, alehouse-keeper, or common victualler, trust or give credit to any person inhabiting in the same town where they are trusted, or to any person whose place of abode is within five miles' distance, for victuals or drink, for more than *ten shillings*; such innholder, retailer, alehouse-keeper, or common victualler, shall loose all such sums so trusted, and all actions brought for such debt or debts shall be utterly excluded and barred. And the defendant, in such action, may plead the matter specially, or, under the general issue, give the matter in evidence. Ibid. s. 12.

X. Liability of those who, not being licensed, presume to be innholders, or presume to sell any strong or mixed liquors.

By statute it is enacted, that no person may presume to be a common victualler, innholder, taverner, or seller of wine, beer, ale, cyder, brandy, rum, or any strong liquors, by retail, or in a less quantity than twenty-eight gallons, and that delivered and carried away all at one time, except such persons be first duly licensed according to law, on pain of forfeiting the sum of *twenty pounds*; and if any person, shall, at any time, sell any spirituous liquors, or any mixed liquors, part of which is spirituous, without license therefor duly had and ob- Ibid. s. 1.

## INNOLDERS AND RETAILERS

tained according to law, he shall forfeit and pay, for each offence, a sum not exceeding *six pounds*, nor less than *forty shillings*; which fine or forfeiture, as also the fine or forfeiture aforementioned, shall enure one half thereof to the informer, the other half to the county where such offence is committed.

*Ibid.* s. 4.

So, no person may presume to sell any strong or mixed liquors, part of which is spirituous, (except those who are licensed for common victuallers, taverners, or innholders,) to be drank in their houses, or any of the parts or dependencies of the same; and if any person licensed to sell wine, beer, ale, cyder, brandy, rum, or any strong liquors by retail only, shall be convicted of entertaining, or suffering any person or persons to drink such strong liquors, in their shops, houses, or parts or dependencies of such shops or houses, he shall incur and suffer the like penalties and forfeitures as are inflicted by this law, upon persons selling without license, to be recovered and appropriated in the same manner.

XI. Penalty for a second or third breach of the act relative to licensed houses; the mode of prosecution for a breach of the act; the appropriation of fines, and the punishment when the delinquent omits to pay his fine.

*Ibid.* s. 8.

Second breach.

If any person, after being duly convicted of any breach of such law, shall again break any part of such law, and thereof be duly convicted, he shall, over and above suffering the penalty set to such breach of such law, recognize for his good behaviour, in the sum of *twenty pounds*, for one year, with two sufficient sureties, over and above his recognizance for good order, at taking out his license.

Third breach.

And if any person convicted of a second breach of such law, as aforesaid, shall presume again to break any part of such law, over and above suffering the penalty of such law, for such breach of it, he or she shall forfeit his or her license, not to be renewed again for the space of three years next following.

So if any person, being duly convicted of any breach of this law, shall be unable, or shall neglect to pay and satisfy the fine imposed, together with the costs of prosecution, and likewise give bond for his good behaviour; if it be on the second conviction, within twenty-four hours next after sentence declared in that respect, it shall be lawful for the court, before whom such conviction may be, to order such offender to be openly whipped, not exceeding fifteen stripes, for one offence, nor less than ten, and to restrain the offender in prison, until the said fine and charges are paid and bond given as aforesaid, or the order for corporal punishment be executed.

*Ibid.* s. 9.

Punishment in case the delinquent neglects to pay his fine.

All fines and penalties arising for any of the offences aforesaid, not otherwise appropriated, shall be disposed of, one half thereof to the use of the county where the offence is committed, and the other moiety to him or them who shall inform and prosecute for the same; except where the offence is prosecuted by a grand jury, before the supreme judicial court, or court of general sessions of the peace; in which case the whole forfeiture to be to the use of the county.

*Ibid.* s. 20.

Appropriation of fines.

And every justice of the peace is empowered to hear and determine any of the offences above-mentioned, committed within his county, where the penalty doth not exceed *four pounds*, and not otherwise. And every justice of the peace before whom such conviction shall be had, and where the party convicted doth not appeal, shall make a certificate of the same; and the justice before whom such conviction is, shall cause the same to be fairly written, and shall return the same to the then next general sessions of the peace, for the county where the said offence is committed, there to be read over in open court, and filed among the records of the same court, to the end, among other things, that it may be known that the offenders are duly prosecuted.

*Ibid.*

Justices of the peace empowered to determine certain offences within the act.

TITLE LXXXVII.

INQUEST OF DEATH.

Stat. 1783 c. 43, s. 2.

Coroner's warrant  
for a jury.

**E**ACH coroner shall, as soon as he be certified of the dead body of any person, supposed to have come to his death by violence, or casualty, found or lying within his county, make out his warrant, directed to the constable of the town where the dead body is found or lying, or to the constables of one or more of the three or four next adjacent towns, requiring them forthwith to summon a jury of good and lawful men of the same town or towns, sufficient to make up eighteen in all, to appear before him at the time and place in such warrant mentioned and expressed.

See Appendix, No. 12.

The form of this warrant is prescribed by statute.

Ibid.

Execution of such  
warrant.

Every constable to whom such warrant is directed and delivered, shall forthwith execute the same, and shall repair to the place where the dead body is, at the time mentioned, and make return of the warrant with his doings thereon unto the coroner who granted the same. And every constable failing unnecessarily in executing such warrant, or of returning the same as aforesaid, shall forfeit the sum of *three pounds*.

Ibid.

Penalty for non-ap-  
pearance of a juror.

A juror thus summoned, that shall fail of appearance, without having reasonable cause therefor, shall forfeit *forty shillings*.

Ibid.

How recoverable.

These forfeitures are recoverable by action of debt, before any court that can take cognizance of the same, and shall be applied to the use of the court.

Ibid.

Foreman appointed.  
Juror's oath.  
See Appendix, No. 13.

When the jury appear, the coroner must select twelve or more of them, and appoint a foreman. To the foreman and his fellows he must administer the oath pointed out by the statute.

After the jurors are sworn, it is the duty of the coroner to charge them, upon their oaths, to declare of the death of the person, whether he died of felony, or of mischance, or accident; and if of felony, who were the principals, and who were accessaries, with what instrument he was struck or wounded, and so of all prevailing circumstances which may come by presumption; and if by mischance or accident, whether by the act of man, and whether by hurt, fall, stroke, drowning or otherwise: to inquire of the persons who were present, the finders of the body, his relations and neighbours, whether he was killed in the same place where he was found, and if elsewhere, by whom, and how he was brought from thence, and of all circumstances relating to the said death: and if he died of his own felony, then to inquire of the manner, means, or instrument, and of all circumstances concerning it.

*Ibid.*

Coroner's charge to the inquest.

After the jury are charged, the coroner must make proclamation, for any person that can give evidence, to draw near, and that they shall be heard.

*Ibid.*

Proclamation for evidence.

The coroner may issue his warrant for witnesses to appear before him for examination. To these witnesses he shall administer an oath prescribed by the statute.

*Ibid.*

Warrant for witnesses. Their oath. See Appendix, No. 14.

The testimony must be in writing and subscribed by the witnesses; and if it relate to the trial of any person concerned in the death, the coroner must recognize such witnesses in a reasonable sum, for their personal appearance at the next supreme judicial court, to be holden within and for the same county, there to give evidence accordingly.

*Ibid.*

Form of the testimony. Witnesses to be recognized.

Upon the refusal of a witness to enter into such recognition, the coroner has power to commit him to the county gaol.

*Ibid.*

On refusal to recognize he may be committed.

When the jury have sufficiently viewed the body, and heard the witnesses, they must draw up and deliver unto the coroner their verdict upon the death under consideration, in writing under their hands and seals, as prescribed by statute.

*Ibid.*

Verdict of the inquest. See Appendix, No.

*Id.*

Return of the inquisition.  
See Appendix, No. 16.

*Id.*

Coroner in certain cases to give information to a justice of the peace.

Stat. 1806, c. 29.

Duty of a coroner to bury the deceased in case he be a stranger.

The coroner must return the inquisition, written evidence, and recognizance, by him taken, to the next supreme judicial court.

If it appear by the inquisition, that the death came by the felony or misfortune of another, the coroner shall speedily inform one or more of the justices of the same county thereof, to the intent that the person killing or being any way instrumental to the death, may be apprehended, examined and secured in order for trial.

If the dead body be that of a stranger, it is the duty of the coroner, after the return of the inquisition, to bury such body in a decent manner; and the expenses thereof, together with all the expenses of said inquisition and the coroner's fees, shall be paid to said coroner ~~out~~ of the treasury of this commonwealth, an account of said expenses being first examined and allowed by the general court, in the same manner that accounts for state paupers are allowed. *Provided*, the coroner, who shall return the inquisition, shall certify, under oath, that the person found dead, was a stranger not belonging to this commonwealth, according to the best of his knowledge and belief; otherwise the expenses of taking up and burial, shall be paid to such coroner, by the town where such dead body was found, and repaid to them by the town to which said stranger belonged, if an inhabitant of this commonwealth; and the expenses of said inquisition shall be paid to the coroner, by the county in which the inquisition shall be taken.

NOTE.—The statute last above quoted of 1806. c. 29. repeals the statute of 1805, c. 66. which relates to the same subject.

TITLE LXXXVIII.

INQUEST OF OFFICE.

1. **O**f an inquest, where the commonwealth claims a reseizin of an estate, upon condition broken.
2. Of an inquest in other cases.
3. Of an inquest where the defendant is an alien, or is the tenant, agent, servant or bailiff of an alien.
4. Of a recovery by the heirs, after a seizin of the commonwealth on a supposed defect of heirs.

I. Of an inquest, where the commonwealth claims a reseizin of an estate, upon condition broken.

By statute it is enacted, that in all cases where lands, tenements or hereditaments, have been granted, or confirmed by the late province or colony of *Massachusetts-Bay*, or by this commonwealth, or which may be granted or confirmed by this commonwealth, on certain conditions in such grants or confirmations mentioned, and the commonwealth shall claim to be revested in the same, for the breach of one or more of the said conditions, an inquest of office shall thereupon be taken, in the supreme judicial court in the county where the estate lies, *that is to say*, the attorney-general, shall, upon the direction of the legislature, file an information in behalf of the commonwealth, in the said court, at any term thereof, in any county, setting forth, among other things, the grant or confirmation, with the conditions therein mentioned, and assigning the breaches of such of said conditions as shall be directed by the legislature, and of

Stat. 1791, c. 13, s. 1.

Where to be taken.

Information.

What it must set forth.

Assignment of breaches.

*Scire facias* against the defendants.

When returnable.

When to be served.

*Ibid.*

Judgment in case the defendants do not appear, or do not plead, or in case of disclaimer.

*Ibid.*

Proceedings in case defendants claim to hold the estate.

*Ibid.*

Judgment in case of a verdict for the commonwealth.

no others, (1) and alleging that by force thereof, the commonwealth have right, by law, to be revested in the said estate, and praying that process may issue thereupon in due course of law ; whereupon the court shall order a *scire facias* to issue against such person or persons, bodies politic and corporate, or proprietors, as the attorney-general, in his information, shall allege, hold the estate under such grant or confirmation, returnable to the said court at one of the terms to be holden in the county, where the estate lies ; which *scire facias* shall be served thirty days before the sitting of the court to which the same is made returnable.

And if the defendants shall not appear, or appearing, shall refuse to plead, judgment shall be rendered, that the commonwealth be reseized of the estate described in the information ; and if the defendants shall, by plea, disclaim to hold the said estate, or any part thereof, then judgment shall be rendered, that the attorney-general take nothing by his information, so far as the same respects the estate so disclaimed ; and the defendants, their heirs and assigns, shall, for ever thereafter, be estopped from claiming or holding the estate so disclaimed, under the said grant or confirmation.

But if the defendant's shall claim to hold the said estate, or any part thereof, under such grant or confirmation, and shall traverse the breaches assigned, issue being joined thereon, the same shall be tried by a jury at the bar of the said court, in the usual and due course of law ; and a view may be granted or a plan ordered, when necessary, as in the trial of real actions.

And if the issue be found in favour of the commonwealth, judgment shall be rendered, that the commonwealth be reseized of the said estate, and recover costs of suit, for which costs, execution shall issue in due form

(1) See Stat. 1796, c. 4. quoted in the last paragraph under this head.

of law ; but if the issue shall be found for the defendants, judgment shall be rendered, that they recover their costs of suit, to be taxed by the court, and paid out of the public treasury, by warrant of the governor and council.

Judgment in case of a verdict for the defendants.

*Provided nevertheless*, if the only condition alleged to be broken, is, that the defendants hold more land under such grant or confirmation, than they have right by force thereof, to hold, and the same shall appear, either by verdict of the jury, or confession of the defendants, then the justices of the said court shall have power to assign to the defendants by metes and bounds, at their request and cost, so much of the land which shall be held by the defendants as aforesaid, as shall be equal in quantity to the land they might lawfully have held under such grant or confirmation, and in such part thereof, as shall be just and reasonable, under all the circumstances of the case ; and may order the same to be located by proper persons, to be appointed for that purpose by the court, at the expense of the defendants ; which location, with a plan thereof, shall be returned to the said court, and may be confirmed by the same, unless good cause be shewn to the contrary, by the attorney-general, or the defendants ; and if such location shall be confirmed, then the court shall order an attested copy thereof, and of the said plan, to be filed, at the expense of the defendants, in the secretary's office, and judgment shall be rendered, that the commonwealth be reseized in the residue, and recover costs of suit.

Ibid. s. 2.

Proviso.  
If the defendants hold more land than they have a right to hold; power of the court in such case.

By a subsequent statute, 1796, c. 4. it is provided, that in all cases wherein the legislature hath already directed, or shall direct the attorney-general to institute an inquest of office, in order to revest the title and possession of any real estate in the said commonwealth, for the breach or breaches of any of the conditions of the leases, grants or other conveyances thereof, it shall be the duty of the said attorney-general, to assign such breach or breaches of conditions, in the information he shall file, as to him shall

Attorney-general may assign such breaches as he thinks proper.

appear proper, though there shall be no act of the legislature directing or designating the same.

## II. Of an inquest in other cases.

*Ibid.* s. 3.

Where such inquests shall be taken.

Information.

Proceedings.

In case there be no ter-tenant.  
Notice.

Form and publication of notice.

*Ibid.*

Judgment, where no person appears, etc.

Proceeding in case any person shall appear and deny the title of the commonwealth.

*Ibid.*

Verdict.  
Judgment.  
Costs, for the commonwealth.

The same statute has further enacted, that in all other cases, when an inquest of office is necessary by law, to entitle the commonwealth to hold lands, tenements or hereditaments, such inquest shall be taken by the supreme judicial court, in the county in which such estate lies, upon information of the attorney-general, describing among other things, the estate claimed, and the title set up thereto, by the commonwealth; and upon the filing of such information, the same proceedings shall be had as before directed, *mutatis mutandis*, unless where there is no ter-tenant; and in such case, notice shall be given to any person or persons, claiming such estate, to shew cause, at such term of the said court, as shall be mentioned in the notification, why judgment should not be rendered, that the commonwealth be seized of such estate, by causing an attested copy of such information, with the order of the court thereon, to be published, in such public newspapers as the court shall direct, three weeks successively, ninety days at least before the sitting of the said court.

And if no person shall appear, and by plea, deny the title of the commonwealth to such estate, then judgment shall be rendered, that the commonwealth be seized thereof. But if any person shall appear, and by plea, deny the title set up by the commonwealth, the cause shall be tried by a jury, at the bar of the court; and a view or a plan may be ordered, as in the trial of real actions.

And if a verdict shall be found, that the commonwealth have good title to such estate, judgment shall be rendered, that the commonwealth be seized thereof, and recover costs of suit against the defendant, for which costs, execution shall issue in due form of law: but if the jury

shall find, that the commonwealth hath no title to such estate, and that the defendant hath good title thereto, the defendant shall recover his costs of suit, to be taxed by the court, and paid out of the public treasury, by warrant of the governor and council ; but if the jury do not find that the defendant hath good title to such estate, then he shall not be allowed his costs.

Verdict.  
Judgment.  
Costs for the defendant.

III. Of an inquest where the defendant is an alien, or is the tenant, agent, servant or bailiff of an alien.

By statute it is enacted, when it shall be found, by the attorney-general, for the time being, that there are any lands, tenements or hereditaments, which, for want of legal heirs, have accrued to the commonwealth, that it shall be the duty of the attorney-general to prosecute a suit by inquest of office in the supreme judicial court in the county wherein such estate is situated, in order to cause the commonwealth to become seized thereof ; and that on such process and trial, the person, against whom such process and suit shall be so brought, shall not be allowed to give in evidence, or to avail himself of the title and right of an alien, or subject of another nation or sovereign, unless he can shew that he is tenant to, agent, servant or bailiff of such alien.

Stat. 1798, c. 43, s. 1.

Duty of the attorney-general.  
Where such inquest shall be taken.

Certain evidence rejected conditionally.

The same statute has further provided, that if it shall appear to the court, that the person, against whom such estate shall be demanded, had, at the time of the service of the process upon him, a good and valid title in himself to the premises demanded, or that he was then in possession of the same as the tenant, agent, servant or bailiff of an alien who had a right thereto, or to any part thereof, then the court shall award the defendant his full cost, which shall be paid out of the public treasury, according to the constitution of the government : but if such party had not a title in himself when the process was served upon him, nor was the tenant, agent, servant or bailiff of such alien at that time, but shall afterwards

Ibid. s. 3.

In what case defendant shall receive costs.

In what cases he shall pay costs.

have acquired a title, been made a tenant, or become the agent, servant or bailiff of any alien, in whom such estate is, then judgment shall be awarded against him for full costs, and the attorney-general shall cease to prosecute further on the process.

IV. Of a recovery by the heirs, after a seizin of the commonwealth on a supposed defect of heirs.

*Ibid.* s. 2.

Such estate liable to all expenses of improvement.

To be recovered by bill in equity.

Summons to the owner, etc.

Execution against such estate.

Sale of such estate by the sheriff.

The same statute has further enacted, that if, after the commonwealth shall become so seized of such estate, as having accrued thereto for want of legal heirs, any person shall appear and make out his right to the same, and shall, in due process of law, recover the same against the commonwealth, its grantee, assignee or tenant, the same estate shall, nevertheless, be liable to all expenses of improvement thereon made, over and above the rents and profits thereof; and the attorney-general, or the tenant, grantee or assignee of the commonwealth, shall be empowered to file a bill in equity in the supreme judicial court of the county where the land is, for the recovery of the same; and a summons shall be issued, with a copy of such bill thereunto annexed, and served on the owner of such land, or on his tenant, fourteen days before the sitting of the court to which it may be returnable; and the supreme judicial court shall proceed to try the same by a jury or otherwise, according to the principles of the laws and constitution of the commonwealth, and shall issue an execution against such estate for the payment of such sum as shall be adjudged on such process; and the sheriff or other officer, to whom the same shall be directed, shall, at public auction, sell so much of the same lands as shall be sufficient to pay the same, with all charges, unless the same shall be otherwise discharged.

TITLE LXXXIX.

INSOLVENT ESTATE.

1. **T**HE duty of executors and administrators, where an estate is insolvent.

2. The appointment of commissioners; their power, duty, and compensation. Distribution among the creditors.

3. How a creditors's claim upon an insolvent estate, may be decided at law, when rejected in whole, or in part, by the commissioners, or disapproved of by the executor or administrator.

4. On what demands actions may be brought against an executor or administrator, after the estate is represented insolvent.

5. The right of a creditor to an action against the executor or administrator of an insolvent estate, who neglects to settle his administration account with the judge of probate.\*

I. The duty of executors and administrators, where an estate is insolvent.

When the estate of any person deceased shall be insolvent, or insufficient to pay all just debts which the deceased owed, the same shall be distributed to and among all the creditors, in proportion to the sums to them respectively due and owing, saving that debts due for all rates and taxes, and debts due to the commonwealth, and for the last sickness, and necessary funeral expenses, shall be first paid. And the executor or ad-

Stat. 1784, c. 2.

\* How a creditor's attachment is affected by the subsequent insolvency of the debtor's estate, See Title ATTACHMENT.

ministrator, appointed to any such insolvent estate, before payment to any be made, (except as aforesaid,) shall represent the condition and circumstances thereof unto the judge of probate,

II. The appointment of commissioners; their power, duty, and compensation. Distribution among the creditors.

Ibid.

Appointment of commissioners by the judge of probate.

When an executor or administrator, represents the estate of the deceased as insolvent, the judge of probate shall nominate and appoint, two or more fit persons to be commissioners, with full power to receive and examine all claims of the several creditors.(1)

(1) "All mutual demands subsisting between the insolvent and his creditors, at the time of his death, are to be liquidated and balanced. If the balance be against the estate, it must be laid before the commissioners, and be by them reported to the judge, that the creditor may receive his dividend. If the balance be against the creditor, it is not a subject of the report, which is to include only claims against the estate. In this last case, if the executor or administrator of the insolvent sue the creditor at law, he must have a right, resulting from the principles of the statute, to plead his own demand by way of set-off, and the executor or administrator can recover only the balance.

"If a creditor claiming a balance against the estate, should, by his own laches, fail to have his balance reported, yet on an action brought against him, he may plead his own demand by way of set-off, to prevent the executor or administrator recovering any thing against him, but he cannot recover his balance against the estate. His own balance must be reported by the commissioners, or he must recover it by action sued pursuant to the statute, in the nature of an appeal from the report; and in this action, and in an action brought by him in consequence of an objection made by the executor or administrator to the report, it is competent for the defendant to plead, by way of set-off, any demand the deceased had against the plaintiff; and if the set-off should exceed the plaintiff's demand, the executor or administrator may recover the balance. This practice results from the statute, and to avoid unnecessary suits.

And such commissioners shall cause the times and places of their meeting, to attend the creditors for receiving and examining their claims, to be made known, by causing notifications thereof, to be posted up in some public place in the shire town of the county, where such deceased person last dwelt, and of the two next counties, or by causing an advertisement thereof to be published in such public newspaper or papers, as the judge of probate shall direct.

*Ibid.*

Notice of the commissioners of their appointment.

And six months, and such further time, not exceeding eighteen months, (as the circumstances of any estate may require,) shall be allowed by the said judge to the creditors, for bringing in and proving their claims; at the end of which limited time, such commissioners shall make their report, and present upon oath, a list of all the claims that shall have been laid before them, with the sums they shall allow on each claim, unto the said judge.

*Ibid.*

Time allowed to creditors for exhibiting their claims.

And such commissioners are authorized to examine, by the oath or affirmation of the creditor, the truth of any claims presented; and to that end, when they are sitting by virtue of such commission, and when it shall be adjudged expedient by a majority of them, may require of such creditor an oath, or, (being a quaker,) an

Stat. 1789, c. 50, s. 1. Commissioners empowered to administer an oath to the creditors.

“ If a creditor, who has objected to the report, and given notice of the objection, does not prosecute his claim at law, within the time limited by the statute; if there has been any claim in his favour reported, it must stand, and he can have no relief. If his claim has been rejected, he cannot after that time prosecute it at law to recover a balance; although, when sued by the executor or administrator, he may plead his claim, by way of set-off, in bar of the action, so far as the set-off shall be allowed. But if the objection to the report come from the executor or administrator, and the creditor does not prosecute his claim, within the time allowed by the statute, the claim reported must be struck out, and he can have no remedy at law, but by way of set-off, to an action instituted by the executor or administrator, in which he cannot recover any balance.” By the court in *McDonald v. Webster*, 2 Mass. Rep. 499.

affirmation; to be administered by any one of the said commissioners.

The form of this oath is prescribed by statute.

See Append. No. 17.

Ibid.

Commissioners may examine the creditors under such oath.

And thereupon, such commissioners may inquire of the truth of any writing, demand, or the charges in any account exhibited as a claim against such insolvent estate, and whether the same and every part of such claim remains actually due and unpaid, and may make such other questions relative thereto, as shall be material and tending to discover the truth of such claim.(2)

Stat. 1784, c. 2.

Commissioners' recompense.

Distribution among the creditors.

And the judge shall order the commissioners meet recompense out of the deceased's estate, for their care and labour in examining the claims; and the debts due for all rates and taxes, and debts due to the commonwealth, debts incurred for the last sickness of the deceased, and necessary funeral expenses as before provided, being first deducted, shall order the residue and remainder of the estate, both real and personal, (the real estate being sold according to law,) to be paid and distributed to and among the creditors, who shall have made out their claims with the commissioners as aforesaid, in proportion to the sums unto them respectively due and owing, saving unto the widow, (if any there be,) her right of dower in the houses and lands of the deceased; which dower, (unless the reversion shall be sold by the executor or administrator, and distributed with the other estate, which the judge may order if he see fit, upon application therefor,) at the expiration of her term, shall also be distributed among the creditors aforesaid, in like proportion.

Widow allowed her dower in the estate.

Reversion of such dower may be sold,

or distributed.

III. How a creditor's claim upon an insolvent estate, may be decided at law, when rejected in whole, or in part, by the commissioners, or disapproved of by the executor or administrator.

(2) A false oath before such commissioners may be the subject of legal perjury. See the above statute, s. 3.

Notwithstanding the report of any commissioners, any creditor whose claim is wholly or in part rejected, may have the same determined at the common law, in case he shall give notice thereof in writing, at the probate office, within twenty days after such report shall be made, and bring and prosecute his action as soon as may be.

*Ibid.*

A creditor whose claim is rejected by the commissioners may have the same determined at common law.

And in case the executor or administrator shall be dissatisfied with any creditor's claim allowed by the commissioners, and shall give notice thereof at the probate office, and also to the creditor, within twenty days as aforesaid, such claim shall, by the judge of probate, be struck out of the commissioners' report, unless such creditor shall commence and prosecute, at the common law, his claim as aforesaid, as speedily as the same can be done, or unless the creditor and the executor or administrator shall agree, before the judge, to submit the same to reference; in which case, the determination of the referees shall be final.

*Ibid.*

Proceedings in case the executor, etc. is dissatisfied with any claim allowed by the commissioners.

And when a claim shall be disputed in the course of the common law as aforesaid, execution shall not issue as in common cases, but the judgment of the court respecting the same, shall be the amount of the claim, and added to or deducted from the commissioners' report, as the case may require.

*Ibid.*

Case of such claim disputed at common law, how judgment shall be satisfied.

And if any creditor shall not make out his claim with the commissioners within the time of their commission, or at the common law, or before referees, in the manner provided by the act, he shall be for ever barred of his debt; unless such creditor shall find some other estate of the deceased, not inventoried or accounted for by the executor or administrator before distribution. (3)

*Ibid.*

Duty of the creditor to make out his claim seasonably.

(3) Neither the judge of probate, nor the supreme court of probate on an appeal from the judge, can examine the merits of a claim against an insolvent estate reported by the commissioners. The only remedy in such a case is, for the party dissatisfied with the report, to file his objection as pointed out by the statute, and have the same determined at common law.

Gold v. M'Mechan, 1 Mass. Rep. 23.

IV. On what demands actions may be brought against an executor or administrator, after the estate is represented insolvent.

*Ibid.*

What actions may be brought.

No action brought against any executor or administrator, after the estate shall be represented insolvent, shall be sustained, except for debts due to the commonwealth, debts due for all rates or taxes, for the deceased's last sickness and funeral charges, unless the executor or administrator having objection to the claim upon which such action shall be brought, shall consent to have the same settled by course of law; in which case the judgment of the court shall determine the said claim, and be reported by the commissioners as such.

*Ibid.*

Actions brought before the estate is represented insolvent, to be continued.

And all actions brought against any executor or administrator before the estate is represented insolvent, shall be continued until it shall appear whether the said estate is insolvent or not; and if found insolvent, shall be conducted as before provided by the act.

V. The right of a creditor to an action against the executor or administrator of any insolvent estate, who neglects to settle his administration account with the judge of probate.

Stat. 1794, c. 5.

Executors, etc. neglecting, etc. to settle their administration account within a limited time.

By statute it is enacted, that when any executor or administrator shall neglect to exhibit and settle his account of administration with the judge of probate, where the estate has been represented insolvent, and commissioners have reported to the judge a list of claims, within six months after such report shall be made to the judge, or within such further time as the judge of probate shall think proper to allow therefor, under his hand and seal, so that by such refusal or neglect, the judge cannot proportion the estate among the creditors; any creditor to such estate may commence and prosecute, or prosecute any action then already commenced, and depending for his demand against such executor or ad-

In such case, any creditor is allowed to institute, or prosecute his claim at law.

ministrator; and the court before whom such action may be depending, may proceed to hear and determine the same, and to give judgment therein, and award execution thereon, in the same manner as if such estate had not been represented insolvent.

Execution may issue on judgment obtained in such action.

And upon the return of such execution duly made, that the executor or administrator refused or neglected, upon due request, to satisfy the same, such refusal or neglect shall be deemed waste, and upon *scire facias* brought, judgment shall be given in favour of such creditor, to recover his debt, with costs, against the proper goods or estate of such executor or administrator, and for want thereof, against his body. And if in consequence of such refusal or neglect, the real estate of the deceased shall be exposed to be, and shall, in fact, be levied upon, and taken to satisfy such execution, it shall, in like manner be deemed waste in the executor or administrator upon such estate.

*Ibid.*

A refusal to settle such execution, to be waste in the executor, etc.  
*Scire facias* may issue against such executor, etc.

If the real estate of the deceased be taken in such execution, it shall be deemed waste in such executor, etc.

## TITLE XC.

## INSURANCE.

Sciw. 324.

**I**NSURANCE is an agreement, whereby one party, in consideration of a sum of money, either given or contracted for, undertakes to pay the other party a certain sum of money, upon the happening of some event. *A policy of insurance* is the instrument in which the terms of this agreement are set forth. To this instrument the insurer having subscribed his name, and in the case of marine insurances, the sum which he undertakes to pay, in case the contingency happens, is termed the *insurer* or *underwriter*. The sum of money received by the insurer as a consideration for his undertaking, is termed the *premium*, and the party protected by the insurance is called the *insured* or *assured*. Under this title I shall notice only *marine* insurance.

1. The several kinds of policies.
2. What policies are illegal.
3. How far a misrepresentation, concealment, or suppression of facts will affect the policy.
4. Of warranty.
5. Of deviation.
6. Of the sea-worthiness of the vessel.
7. Of losses by perils of the sea.
8. Of losses by capture.
9. Of losses by barratry.
10. Of total losses and abandonment.
11. Of partial losses.
12. Of adjustment.
13. Of apportionment and return of premium.

14. Of the construction of policies.
15. Penalties provided by statute for certain frauds on insurers.
16. Of the pleadings and evidence.

#### I. The several kinds of policies.

1. An *interest* policy is where the assured has a real, substantial, assignable interest in the thing assured. Marshall, 199.  
Selw. 827.

2. A *wager* policy is an insurance, founded on an imaginary risk, where the insured has not any interest in the thing insured, and consequently cannot sustain any injury by the happening of the event insured against. Selw. 827.

3. An *open* policy is, where the value of the thing insured is not inserted in the policy, and must, therefore, be proved at the trial, if a loss happens. Ibid.

4. A *valued* policy is, where the value of a thing insured has been settled, by agreement, between the parties, and that value inserted in the policy, in the nature of liquidated damages, so as to supersede the necessity of proving it, in case of a total loss. Ibid.

#### II. What policies are illegal.

It is enacted by an English statute, 19 G. 2, c. 37. "that all insurances, interest or no interest, or without further proof of interest than the policy itself; all gaming or wagering policies, or wherein the insurer shall have no benefit of salvage, are *void*; (except in the case of privateers or ships in the *Spanish* or *Portugal* trade:) and no re-assurance shall be lawful, except the former insurer is insolvent, a bankrupt, or dead."

The question, whether the above statute of 19 G. 2, c. 37. extended to this country, has been brought before the supreme judicial court in this state, in two cases.

The first was *Amory v. Gilman*. The question respecting the statute was not determined, but the court decided that a *wagering* policy was, on common law prin- Amory v. Gilman  
2 Mass. Rep. 1.

ciples, an invalid contract, and consequently was such here.

*Merry v. Prince,*  
2 Mass. Rep. 176.

The other case was *Merry v. Prince*. In this case the court determined that the statute of George was not law in this country : and, that a policy of *re-assurance*, being a valid contract at common law, was consequently such here.

Stat. 1787, c. 48, s. 2.

By statute it is enacted, that all insurance which shall be made, within this state, on any vessel fitted out for the slave trade, and having on board slaves, in order, to be transported from *Africa*, or upon any slaves so shipped on board of any vessel for transportation, shall be void : and the statute may be given in evidence under the general issue, in any action commenced for the recovery of insurance so made.

III. How far a misrepresentation, concealment, or suppression of facts will affect the policy.

Schw. 280.

The allegation of a falsehood, or misrepresentation, (though by mistake,) or the concealment and suppression of the truth, *as to a fact or circumstance, material to the risk*, either by the assured or his agent, is considered as a fraud on the underwriter, and consequently will vacate the policy, or annul the contract from the beginning. Hence the underwriter may avail himself of this ground of defence, even where the loss arises from a cause wholly unconnected with the fact or circumstance misrepresented.

1 Esp. Dig. 64.

*Barber v. Fletcher,*  
Doug. 305.

The representation must be a *positive assertion*.

For where the word *expected* was used, as that the vessel insured was *expected* to sail at such a time, this was holden not to amount to a representation.

1 Esp. Dig. 65.

The representation must also be *material*, and at the same time be *false* ; for though the representation be not *strictly* true, yet if it be more beneficial to the underwriters, the policy shall be good.

For where the instructions to insure shewn to the underwriters, stated the ship to carry "*twelve guns and twenty men;*" and in fact she sailed with a *greater* force; the policy was held to be good, the representation being substantially performed, and for the benefit of the insurer.

*Pawson v. Watson,*  
Cowp. 785.

So the keeping back any circumstance in his knowledge by the insured, to mislead the underwriter into a belief that the circumstance did not exist, or to estimate the risque, as if it did not exist, is a fraud, and avoids the policy. And the case is the same though the suppression happened through mistake, and without any fraudulent intent; for the insurer is deceived.

*Per Lord Mansfield,*  
3 Burr. 1009.

But the insured may be innocently silent, as to the grounds open to both parties to exercise their judgments on; therefore, he need not mention what the insurer knows already; or what he ought to know; what he takes upon himself to know, or what he waves being informed of.

*Ibid.* 1210.

As if an underwriter insures a private ship of war, he need not be told the secret enterprize it is destined for; because he knows some expedition is in view, and from the nature of the contract he waves the information.

*Ibid.*

A representation, as it does not form any part of the written policy, requires only to be *substantially* performed. It is distinguishable in this respect from a warranty, which being part of the policy, must be *strictly* performed.

S. 1w. 851.

#### IV. Of warranty.

Every warranty incorporated in the body of the policy, or appearing on the face of the instrument, e. g. in the margin, or at the bottom of the policy, or inserted in any print or writing, which is by reference incorporated with the policy, must be *strictly* and literally complied with; and in this respect it is distinguishable from a mere *representation*, which, if it be *substantially* fulfilled, it is sufficient.

*Ibid.* 885.

Ibid.

The most usual kind of warranties inserted in policies are, 1. As to the time of sailing. 2. The safety of the ship at a particular time. 3. Departing with convoy. 4. That the thing insured is neutral property.

1. As to the time of sailing.

Hoare v. Whitmore,  
Cowp. 784.

Where a ship was warranted to sail from *Jamaica*, on or before a particular day, and before that day *was prevented from sailing by an embargo*. The insurer was held to be discharged, though the terms of the policy *could not* be performed.

1 Esp. 67.

The same literal adherence to the terms of the policy shall charge the insurers.

Bond v. Nutt,  
Cowp. 601.  
Doug. 353, 5 C.

As if a ship warranted to sail by a certain day, before that day breaks ground on her voyage home, though she is put back by stress of weather, or recalled by an embargo; the policy remains good, though she does not sail afterwards until long after the day. For she has performed the terms of the policy, by beginning her voyage on that day.

2. The safety of a ship at a particular time.

Whelhurst v. Coekell,  
3 T. R. 360.

Schw. 887.

Goods were insured from the lading of them, on board a certain ship, "lost or not lost," and at the bottom of the policy was added, "*warranted well on a particular day*." It appeared that the defendant underwrote the policy in the afternoon of that day, and that the ship was lost at eight o'clock in the morning of the same day. It was holden that the warranty did not mean that the ship was well at the time when the defendant subscribed the policy, but at *any time* on that day, and consequently that it had been complied with.

3. Departing with convoy.

Ibid. 888.

The form of expression as to this warranty is different in different policies; in some, that the ship shall depart with convoy; in others, that she shall depart with *convoy for the voyage*. In substance, however, these expressions are the same; for it has been solemnly decided, that although the words of the policy are merely "to depart with convoy," yet those words must be un-

derstood to mean, that the ship shall depart with convoy *for the voyage*, as much as if the words, "for the voyage," had been added.

If a ship does not sail with the convoy appointed by government, it is not a sailing with convoy within the terms of the warranty; hence the protection of a ship of war accidentally bound on the same voyage, although discharging the office of convoy, is not a convoy within the meaning of the warranty. <sup>Ibid.</sup>

Although the terms of this warranty do not express it, yet it is essentially necessary that the ship should not only depart, but also *continue* with the convoy until the end of the voyage, unless she be prevented by absolute necessity. <sup>Ibid. 890.</sup>

If a ship sails with convoy, but is separated by stress of weather, and does all in her power to rejoin the convoy, this will be considered as a sufficient compliance with the warranty, so as to render the insurers liable. <sup>Ibid.</sup>

4. That the thing insured is neutral property.

That a warranty of neutrality may be satisfied, it is necessary,

1. That the vessel insured shall belong to the subject of a neutral state. <sup>Ibid. 893.</sup>

2. That the vessel should be navigated not only according to the law of nations, but also in conformity to the particular treaties subsisting between the country to which she belongs and the belligerent states. <sup>Ibid.</sup>

#### V. Of Deviation.

Another condition implied in the contract of insurance is, that the ship shall not deviate. Hence another ground of defence on which the underwriter may insist, viz. that there has been a deviation, by which term is to be understood a wilful and unnecessary departure from the due course of the voyage insured, either with or without the consent of the assured for any, even the shortest space of time. <sup>Ibid. 897.</sup>

*Green v. Young*,  
3 Reym. 840.  
Salk. 444.

The effect of a deviation is not to avoid the contract *ab initio*, but only to determine it from the time of the deviation, and to discharge the insurer from all subsequent responsibility. Hence damage sustained before the actual deviation must be made good by the underwriters. From the moment of deviation, however, the contract is at an end, and it is immaterial from what cause the subsequent loss arises.

*Bratton v. Haworth*,  
6 T. R. 531.

If two ports of discharge are named in the policy, and the ship intends going to both, she must take them in the order named in the policy. Hence, where a ship insured for A. and B. meaning to go to both, went first to B. in her way to A; it was holden to be a deviation from the voyage insured, not being in the order named in the policy.

But a deviation is excusable in the following cases.

*Schw. 899.*

1. Going into port for the purpose of refitting or repairing.

*Ibid.*

2. Stress of weather.

*Ibid.*

3. Avoiding an enemy, or seeking for convoy.

*Lavabre v. Wilson*,  
Doug. 284.

Whenever such circumstances exist as render a deviation necessary, the voyage (which may then be termed the voyage of necessity) must be pursued according to its due course in like manner as the original voyage.

*Schw. 900.*

An intention to deviate from the due course, not carried into execution, will not be considered as a deviation.

*Stocker v. Farris*,  
3 Mass. Rep. 409.

A ship, cargo and freight are insured "from *Boston* to the *Canaries*, at and from thence to any port or ports in *Spanish America*, and at and from thence to her port of discharge in the United States, under whatever papers she may sail." She goes safely to the *Canaries*, and from thence under *Spanish* colours and with *Spanish* papers to *Vera Cruz*, where the outward cargo is landed, and afterwards seized by the *Spanish* government as an illegal importation: the master remains with the ship five months at *Vera Cruz* prosecuting the recovery of the cargo. Failing in that object, he takes a cargo on freight

for the *Havanna*, at which place he was to exchange his papers, and thence return to the *United States*. On her passage to the *Havanna* the ship is captured and condemned.

It was held, that the stay at *Vera Cruz* was not, and that the voyage to the *Havanna* was a deviation.

#### VI. Of the sea-worthiness of the vessel.

In every marine insurance, whether on ship or goods, there is an implied warranty, that the ship is sea-worthy at the commencement of the risk, or in the language of the charter-party, tight, staunch and strong. Any defect, which may endanger the ship, though unknown to the assured, will discharge the underwriter; for it is the duty of the assured to provide a good ship, in such state and condition as to be able to perform the destined voyage, *i. e.* sea-worthy. Selw. 900.

It is also an implied condition, that the ship shall be furnished with every article necessary for the purpose of safe navigation during her voyage, a sufficient number of hands on board, an able captain, skilful pilots, &c. Ibid.

In this case, Lord Ellenborough, C. J. said, that the vessel must not only be sea-worthy, but the crew must be adequate to discharge the ordinary duties, and to meet the usual dangers to which she is exposed. Hunter v. Potts, London Sittings after Tr. n. T. 45 Geo. 3.

#### VII. Of losses by perils of the sea.

Losses by *perils of the sea* are understood to mean only such as proceed from mere sea-damage, that is, such as arise from stress of weather, winds and waves, from lightning and tempests, from striking against rocks, from sands, &c. Marsh. 415. Selw. 848.

If there has not been any intelligence received of a ship within a reasonable time after she has sailed, it will be presumed that she perished at sea, and the assured may maintain an action against the underwriter, stating the loss to have happened by the vessel sinking at sea. Ibid.

Ibid.

What shall be deemed a reasonable time must depend on the distance and length of the voyage, &c.

Ibid.

Evidence of the vessel having sailed on her intended voyage on such a day, and not having been heard of since, is the best evidence, which the nature of such a case admits of, and consequently will be sufficient to support the action.

#### VIII. Of losses by capture.

Per L. Mansf. in  
Goss v. Withers,  
2 Burr. 694.

To constitute a loss by capture within the meaning of the policy, it is not necessary that the ship should be condemned or carried into any port or fleet of the enemy.

Marshall, 483. cited  
per Cur.  
3 Mass. Rep. 248.

Any detention by princes, by embargo or otherwise, gives the insured a right to abandon and claim as for a total loss, as well as a capture by enemies.

Marshall, 423, 432.  
cited per Cur.  
3 Mass. Rep. 248.

For any loss occasioned by capture, whether lawful or unlawful, and whether by friends or enemies, the insurer is liable. He is also liable, whether the property in the thing insured be changed by the capture or not.

Emmerigon, Tom. 537.  
cited per Cur.  
3 Mass. Rep. 248.

If a neutral ship be taken and carried into the port of a belligerent, under pretence, that she belongs to the enemy, or is laden with enemy's goods, this is a capture, because it is done as an act of hostility; and if she be afterwards restored, still it must be considered a capture.

Selw. 840.

In every case of capture, the insurer is answerable to the extent of the sum insured for the loss actually sustained. This may be either *total*; as where the thing insured is not recovered again; or *partial*, as where the ship is recaptured or restored *before abandonment*; in which case the insurer is bound to pay the salvage, and any other necessary expense which may have been incurred by the party for the recovery of his property.

## IX. Of losses by barratry.

Barratry includes every species of fraud or knavery of the master of the ship, by which the freighters or owners are injured.

Barratry may be committed either by a wilful deviation, in fraud of the owner ; by smuggling ; by running away with the ship, by sinking or deserting her ; or by defeating or delaying the voyage with a criminal intent. <sup>Ibid. 857.</sup>

If by reason of these, or other similar acts, the subject matter insured is detained, lost or forfeited, the assured will be entitled to recover against the underwriter for a loss by barratry ; and such acts being in violation of that duty which the master and mariners owe to the ship-owners, the circumstance of the master or mariners conceiving that they were acting for the benefit of the owners, will not vary the case. <sup>Ibid.</sup>

## X. Of total losses and abandonment.

A total loss is of two kinds ; one, where the whole of the property insured perishes ; the other, where the property exists, but the voyage is lost, or the expenses of pursuing exceeds the benefit arising from it. In the latter case, the assured may elect to abandon to the underwriter all right to such part of the property as may be saved ; and having given due notice of his intention to do so ; the assured will then be entitled to demand a compensation as for a total loss ; but if the assured does not in fact abandon, or if he omits to give the underwriter notice of his having abandoned, or if being required by the underwriter to assign over his interest in the property insured, he refuses to do so, he will not be entitled to claim as for a total loss. <sup>Ibid. 861.</sup>

When the assured has received intelligence of such a loss as entitles him to abandon, it is incumbent on him to make his election to abandon, and to give notice thereof to the underwriter *within a reasonable time*, after the <sup>Mitchell v. Edie,  
1 T. R. 608.  
Selw. 862.</sup>

receipt of the intelligence, otherwise the assured will be considered as having waved his right to abandon, and in case any part of the property insured be saved, he can recover as for a partial loss only.

#### XI. Of partial losses.<sup>1</sup>

Schw. 557.

A partial loss upon a ship or goods, is such a proportion of the prime cost as is equal to the diminution in value occasioned by the damage.

Ibid.

In the case of a partial loss, although the policy be a valued policy, yet the computation must be by the real interest of the assured on board, and not by the value in the policy, that is, the policy, notwithstanding the valuation, must be considered as an open policy.

Lewis v. Rucker,  
2 Burr. 1197.  
Schw. 869.

In the case of a partial loss upon goods, by sea-damage, the rule is, that the underwriter is not to be subjected to the fluctuation of the market, and that he is not liable for any loss which may be the consequence of the duties or charges to be paid after the arrival of the commodity at the place of its destination. Hence, in computing the average in a case of this kind, the difference between the respective *gross* proceeds of the damaged goods, and of the goods, if they had arrived sound *at the port of delivery*, must first be ascertained. Then whatever aliquot part of the gross proceeds of the sound commodity at the port of delivery such difference constitutes, the same aliquot part of the prime cost will be the sum for which the underwriter will be liable: e. g. suppose a hogshead of sugar is insured on a voyage from London to Hamburgh; the prime cost is 30*l*; being deteriorated by sea-damage, the gross proceeds at Hamburgh amount to 40*l*. whereas, if the sugar had not been damaged, the gross proceeds would have amounted to 50*l*. The difference is 10*l*. or one-fifth part of 50*l*. The sum, then which the underwriter must pay, will be one-fifth of 30*l*. the prime cost, or 6*l*. In cases where the sums are more complicated than in the preceding instance, the calculation

may be made as follows: as the gross proceeds of the sound; the gross proceeds of the damaged; the prime cost; a fourth quantity, which being found by the rule of three, must be subtracted from the prime cost, and the difference will be the average loss, or sum for which the underwriter is chargeable.

## XII. Of adjustment.

The adjustment of a loss is the settling and ascertaining the amount of the indemnity which the assured, after all allowances and deductions are made, is entitled to receive under the policy, and fixing the proportion which each underwriter is liable to pay.

Marsh. 529.  
Selw. 870.

An adjustment being indorsed on the policy, and signed by the underwriter, with the promise to pay in a given time, is to be considered as a note of hand. If the underwriter refuses to pay, the assured may declare on the policy, and give the adjustment in evidence, (proving the signature) as an admission of all the facts necessary to be proved. It is not necessary to declare specially on the adjustment. The adjustment is only *prima facie*, and not conclusive evidence against the underwriter.

Ibid.

Hence where the witness, who proved the adjustment, swore that soon after the underwriters had signed it, doubts arose in their minds as to the honesty of the transaction; Lord Kenyon C. J. was of opinion, that in such case the plaintiff should produce other evidence, and that shutting the door against inquiry, after an adjustment, would be putting a stop to candour and fair dealing amongst the underwriters. The court afterwards, on a motion for a new trial, concurred in opinion with the chief justice.

Ibid. 871.

## XIII. Of apportionment and return of premium.

In cases where the contract of insurance is void, as on the ground of non-compliance with the warranty, e. g. to sail with convoy, sea-worthiness, or the like, and fraud

Ibid. 910.

cannot be imputed to the assured, the assured will be entitled to a return of premium, because where the contract does not attach there there is not any risk.

Setw. 911.

In cases where the risk is entire, and has once commenced, as in the case of a deviation, there shall not be any return or apportionment of premium. But if the insurance be on a voyage, which is divisible into several distinct risks, and one or more have not commenced, there shall be an apportionment and return of premium, in respect of those risks which have not commenced.

Taylor v. Sumner,  
and al.  
4 Mass. Rep. 86.

If an insurance be effected against the perils arising from a blockade, supposed by the parties to exist in a foreign port, and in fact no blockade existed at the time, or while such ship remained at such foreign port, the insurance is void, and the premium shall be returned.

#### XIV. Of the construction of policies.

1 Esp. Dig. 75.

1. If a merchant insures a ship generally, as of such a burden; this assurance shall take in the ship only, and not any of the merchandize on board her. But in insuring the cargo, it is not necessary to specify the particular goods, it is sufficient to say on the wares, merchandizes, &c. on board such a ship.

Fong v. Watts,  
2 Str. 1251.

So where the plaintiff made an insurance on a ship and freight, the ship was then careening before she took in her lading, and a tempest having arisen, she was lost: it was adjudged that the plaintiff should only recover for the loss of the ship but not for the freight, the goods not being actually on board, so as to make the plaintiff's right to freight commence.

Molloy, 235.  
1 Esp. Dig. 76.

2. If a ship is insured *from* a port, the insurance does not commence until the voyage is begun, so that the insurer is not liable for a loss *in port*; but if she once breaks ground, though driven back into port, the insurer is liable for a loss, for the voyage was begun. But an insurance *at and from* a port, includes losses while in port.

3. If goods are insured on board any ship and she becomes leaky, if the master and supercargo take them from the ship and put them on board another, the policy is discharged, unless there be these words, "the goods laden to be carried by such a ship or any other, until safely landed," in which case the insurers are liable.

Molloy, 220.  
1 Esp. Dig. 76.

4. When an insurance is made *for any given time*, that time must be *successive*, not at different periods.

Ibid.

As in this case; the insurance was on a letter of marque for six weeks, this it was held should be for six successive weeks, not part at one time and part at another,

Sykes v. Bridge,  
Doug. 509.

5. The insurance is generally for such a voyage or time, and until moored for twenty-four hours in safety; under this clause, where a vessel came in, but before the twenty-four hours expired, was ordered out again to perform quarantine for fourteen days, during which time she was lost: it was adjudged to be within the risk insured, she not being moored twenty-four hours in safety, and the insurer liable.

Waples v. James,  
2 Str. 1243.

6. If a ship is insured to go with convoy, she is warranted by that policy to go to the place where that convoy is, and if in her way thither she is captured, the insurers shall be charged.

Gordon v. Morley,  
2 Str. 1250.

So where a ship sails in pursuance of signal to join a convoy, but is prevented by bad weather from receiving her sailing orders, yet it is a sailing with convoy within the policy.

Victoria v. Cleve,  
2 Str. 1250.

7. The clause in policies of insurance, "to be free from average unless general, or the ship be stranded," means, that only in these two cases of a general average, or the stranding of the ship; the insurers shall be liable to such damages as arise from thence; but all other partial losses are excluded.

Wilson v. Smith,  
3 Burr. 1250.  
1 Bl. Rep. 507, S. C.

XV. Penalties provided by statute for certain frauds on insurers.

By statute 1802, c. 136, entitled "an act to prevent the wilful destruction and casting away of ships and cargoes," it is enacted as follows :

Sec. 1.

For wilfully destroying a vessel.

1. That if any owner of, captain, master, officer, or other mariner, belonging to, any ship or vessel, shall, within the body of any county of this commonwealth, wilfully cast away, burn, sink, or otherwise destroy, any ship or vessel of which he is owner, or to which he belongeth, or in any wise direct or procure the same to be done, with intent or design to prejudice any person or persons that hath or shall underwrite any policy or policies of insurance thereon, or of any merchant or merchants that shall load goods thereon, or of any owner or owners of such ship or vessel ; every person so offending, being thereof lawfully convicted before the supreme judicial court of this commonwealth, shall be deemed and adjudged a felon, and shall be sentenced to imprisonment for life, or for a term not less than five years, at the discretion of the court : *Provided nevertheless*, that nothing herein contained shall be construed to bar or prevent the party injured, from having and maintaining his action for the damages sustained thereby.

Sec. 2.

For fitting out a vessel with intent to destroy her.

2. If any owner of any ship or vessel, shall equip or fit out such ship or vessel within this commonwealth, with intent that the same should be wilfully cast away, burnt, or otherwise destroyed, to the prejudice of any owner of any goods laden on board said ship or vessel ; or of any underwriter upon any policy or policies of insurance upon such ship or vessels, or upon any goods laden thereon ; and shall be thereof convicted before the supreme judicial court of this commonwealth, such offender shall be sentenced to pay a fine not exceeding *five thousand dollars*, to be set in the pillory one hour, and be imprisoned for a term not less than two years, nor more than ten years, at the discretion of said court.

Sec. 3.

3. If any owner of any ship or vessel, or of any goods laden on board such ship or vessel, shall make out and

exhibit, or cause to be made and exhibited, any false or fraudulent bills of parcels, invoices or estimates of any such goods, laden or pretended to be laden on board such ship or vessel, with intent to defraud any underwriter upon any policy or policies of insurance upon such ship or vessel, or upon any goods laden thereon; every person so offending, and being thereof lawfully convicted, shall be sentenced to pay a fine not exceeding *five thousand dollars*, to be set in the pillory one hour, and to be imprisoned for a term not exceeding ten years, at the discretion of the court.

For making false invoices, etc.

4. If any captain, mate or mariner, of any ship or vessel, shall make out and swear to any false affidavit or protest, or if any owner of any such ship or vessel, or of any goods laden thereon, shall procure such false affidavit or protest, or knowing the same to be false, shall exhibit the same with intent to deceive and defraud any underwriter upon any policy of insurance, upon any such ship or vessel, or any goods laden thereon; every person convicted thereof, before the supreme judicial court aforesaid, shall be sentenced to pay a fine not exceeding *five thousand dollars*, to be set in the pillory for one hour, and to be imprisoned for a term not exceeding ten years, at the discretion of the court before which the conviction may be.

Sec. 4.

For making a false affidavit or protest.

#### XVI. Of the pleadings and evidence.

##### 1. The pleadings.

The action of *assumpsit* being that form of action which is most usually brought upon policies of insurance, the defendant may of course plead any plea which the law permits to be pleaded to that action, but as the grounds of defence, which are most usually insisted on by the insurers, go to the disaffirmance of the contract, and consequently may be given in evidence under the general issue of *non assumpsit*; it rarely happens that

Setw. 875.

any other plea is pleaded. This plea puts in issue every material allegation in the declaration.

2. The evidence.

*Ibid.* 903.

In order to support his action, the plaintiff must be prepared with the following proof: 1. The policy must be produced in evidence, and the subscription of the defendant must be proved. 2. Evidence must be given of the interest of the insured in the subject matter of the insurance.

*Ibid.* 903.

It must be proved that the loss happened in the same manner as is stated in the declaration, that the underwriter may be apprized of the case which he has to encounter by evidence.

*Cary v. King*,  
M. B. R. 304.

Where a loss is averred to be by *perils of the sea*, and some of the goods insured are spoiled, and others saved, the expenses of the salvage may be given in evidence (without stating them specially) on this averment, as being a damage within the cause of action as laid.

2 Burr. 904.

If a total loss of a ship is stated in the declaration, and damages laid accordingly, evidence of a partial loss may be received, and the plaintiff may recover to the amount of such loss as he is able to prove.

*Thellusson v. Shedden*,  
2 Bos. and Pul. N. R.  
233.

It is a general rule, that nothing which depends on the proceedings of a court can be proved by parol testimony; hence in cases of capture and re-capture, neither the salvage, nor the expenses incurred for ascertaining the amount of the salvage, can be otherwise proved than by producing the proceedings of the admiralty court.

*Sciw.* 909.

In an action on a policy on goods on board a ship, the master and owner was held not a competent witness to prove the ship sea-worthy, until he had been released by the owner of the goods.

*Bird v. Thompson*,  
1 Esp. N. P. C. 339.

So in an action against an underwriter, for a loss by *baratry* of the master, it was holden, that the master could not be examined by the defendant, to prove that the *baratry* was committed by the consent and with the privity of the owner, without a release by the defendant.

TITLE XCI.

INSURRECTION.

1. **D**UTY of the governor and of civil officers in case of an insurrection.

2. Special duty of the sheriff, justices of the supreme judicial court, and of the court of common pleas, and of the major-general, in case of an insurrection.

3. Penalty, if in case of an insurrection, a commissioned officer of the militia refuse to execute orders.

4. Penalty, if in case of an insurrection, a non-commissioned officer or private refuse to obey orders.

5. Penalty, for dissuading an officer or private from performing the duty required of him in case of an insurrection.

I. Duty of the governor and of civil officers in case of an insurrection.

By statute it is enacted, that whenever an insurrection shall have taken place in either of the counties of the commonwealth, to obstruct the course of justice, or the due execution of the laws, or there is reason to apprehend that a dangerous insurrection for such purposes will be excited, it shall be the duty of the civil officers in such county, as well the sheriff as the justices of the several courts of judicature within such county, immediately to give information thereof to his excellency the governor, for the time being; who is requested thereupon to exercise the power vested in him by the constitution, and to give immediate directions to the major-general or commanding officer of the division where such insurrection exists or is apprehended, and if he shall think it ne-

Stat. 1786, c. 50, t. 1.

## INSURRECTION.

cessary, to the major-general or commanding officer of any other division or divisions, to detach from his or their division or divisions, such part of the militia for the support of the civil authority, as he shall judge fully adequate for that purpose, and for the apprehension and safe keeping of those who may be concerned in such insurrection.

II. Special duty of the sheriff, justices of the supreme judicial court, and of the court of common pleas, and of the major-general, in case of an insurrection.

*Ibid.* s. 2.

By the same statute it is enacted, that if, in the opinion of the sheriff, or of any two of the justices, either of the supreme judicial court or the court of common pleas in any of the counties of this commonwealth, it shall be necessary, for the suppression of any insurrection existing or apprehended as aforesaid, in such county, that a force shall be instantly raised and called forth for that purpose ; and if, by reason of distance, the necessary aid cannot be obtained by order of the commander in chief, it shall be the duty of such sheriff or justices to certify the same, under his or their hand, to the major-general or commanding officer of the division wherein such county lies, or to the commanding officer of some regiment or corps in the vicinity, and to request him or them to detach the whole, or such number of the militia under the command of such officer, for the support of the civil authority, as the said justices or sheriff may think necessary to defeat the purposes of such insurgents, and to apprehend and safely keep them for trial, and as soon as may be, to give notice of such application to the commander in chief, that he may take necessary orders thereupon ; and it shall be the duty of such major-general or commanding officer, upon such request being made, to detach such number of the militia as shall be requested as aforesaid, armed and equipped according to law ; and the militia, so detached and collected, shall afford their assistance to, and be under the direction of the

civil officer or magistrate, unless in case of a rebellion declared by the legislature.

III. Penalty, if in case of an insurrection, a commissioned officer of the militia refuse to execute orders.

The same statute has further enacted, that if any commissioned officer of the militia, shall refuse or wilfully neglect to execute any orders he may receive from his superior officer, to make a detachment from the corps under his command, or to march for the support of the civil authority, or the suppression of any insurrection as aforesaid, in addition to the punishment which may be inflicted by virtue of any act for regulating the militia, if convicted thereof before the justices of the supreme judicial court, he shall be subject to be fined in a sum not exceeding *fifty pounds*, and to be adjudged incapable of sustaining any office in this commonwealth, for a term not exceeding ten years; to either or both of the said penalties, according to the aggravation of the offence and circumstances of the offender, as to the justices of the said court shall seem meet.

*Ibid.* s. 3.

IV. Penalty, if in case of an insurrection, a non-commissioned officer or private refuse to obey orders.

By the same statute it is enacted, that if any person, whether non-commissioned officer or private, and belonging either to the train-band or the alarm-list, who shall be detached or ordered to march for the support of the civil authority, or the suppression of any insurrection existing or apprehended as aforesaid, shall refuse or neglect to march, armed and equipped, in the manner and at the time which the officer, by whom he shall be detached, shall direct, or shall desert or leave the service before he shall be regularly discharged, if convicted thereof before the justices of the supreme judicial court, he shall be subject to be fined, at the discretion of the said court, in a sum not exceeding *ten pounds*.

*Ibid.* s. 4.

V. Penalty, for dissuading an officer or private from performing the duty required of him in case of an insurrection.

*Ibid.* s. 3.

The same statute has further enacted, that if any person in public or private discourse or conversation, or by any ways or means, shall dissuade, or endeavour to prevent any military officer from performing the duty required of him by this act, or any person or persons detached or ordered to march for the purposes aforesaid, from marching to the place of rendezvous, or from continuing in the service until regularly discharged, each person so offending, being convicted thereof as aforesaid, shall pay a fine, to the use of the commonwealth, not exceeding *fifty pounds*, and shall recognize for his good behaviour, for a term not exceeding three years.

NOTE.—For further information on this subject, see title MILITIA, 10th head.

TITLE XCII.

JOINT-TENANTS, TENANTS IN COMMON,  
AND COPARCENERS.

I. JOINT-TENANTS.

At common law, if an estate be given to a plurality of persons, without adding any restrictive, exclusive, or explanatory words, as if an estate be granted to A and B and their heirs, this makes them immediately joint-tenants of the lands. For the law interprets the grant so as to make all parts of it take effect; which can only be done by creating an equal estate in them both. As therefore, the grantor has thus united their names, the common law gives them a thorough union in all other respects.

2 Bl. Com. 180.

How a joint-tenancy is created at common law.

But now, by statute it is enacted, that all gifts, grants, feoffments, devises, and other conveyances, of any lands, tenements, and hereditaments, which have been, or shall be made to two or more persons, whether for years, for life, in tail or in fee, shall be taken, deemed, and adjudged, to be estates in common, and not in joint-tenancy, unless it has been or shall be therein said, that the grantees, feoffees, or devisees, shall have or hold the same lands, tenements or hereditaments, jointly, or as joint-tenants, or in joint-tenancy, or to them and the survivor or survivors of them, or unless other words be therein used, clearly and manifestly shewing it to be the intention of the parties to such gifts, grants, feoffments, devises, or other conveyances, that such lands, tenements, and hereditaments, should vest, and be held as joint estates, and not as estates in common.<sup>(1)</sup>

Stat. 1785, c. 62, s. 4.

How created by statute.

(1) The act contains a proviso, that where any estate had already vested in the survivor, it should be held in like manner, as it would have been held if the act had never been passed.

2 Bl. Com. 180.

The properties of a joint-tenancy.

The properties of a joint estate are derived from its unity, which is fourfold; the unity of *interest*, the unity of *title*, the unity of *time*, and the unity of *possession*: or, in other words, joint-tenants have one and the same interest, accruing by one and the same conveyance, commencing at one and the same time, and held by one and the same undivided possession.

Ibid. 182.

Upon these principles of a thorough and intimate union of interest and possession, depend many other consequences and incidents to the joint-tenants' estate. If two joint-tenants make a verbal lease of their land, reserving rent to be paid to one of them, it shall enure to both, in respect of the joint reversion. So livery of seisin made to one joint-tenant shall enure to both, because of the privity or relation of their estate.

Ibid.

How they must join, and be joined in suits.

So by the common law, in all actions relating to their joint estate, one joint-tenant cannot sue or be sued without joining the other.

Stat. 1785, c. 62, s. 3.

But now by statute it is enacted, that in all actions of waste, ejectment, or other real actions, where possession of the inheritance, alleged to have descended, is the object of the suit, all the heirs, or any two or more of them may join therein, or each one may prosecute for his particular share of such inheritance; and the same rule shall extend to joint-tenants, who are or may be disseized.

2 Bl. Com. 183.

So also, at common law, one joint-tenant cannot have an action against another for trespass in respect of his land.

Stat. 1785, c. 62, s. 2.

But now by statute, such action will lie where a trespass has been committed, pending a writ of partition.

2 Bl. Com. 183,  
Sul. Hist. L. T. 170.

Before the statute of 4 Ann. c. 16, one joint-tenant might take all the profits of the estate, and his partner had no remedy; but since that statute, joint-tenants may have actions of account against each other, for receiving more than their due share of the profits of the tenements held in joint-tenancy.

So also, if one joint-tenant commit waste, his companion may have an action against him. <sup>2 Bl. Com. 183.</sup>

At common law, the most important incident to an estate in joint-tenancy, is that of *survivorship*: by which <sup>ibid.</sup> when two or more persons are seized of a joint estate, <sup>Survivorship.</sup> of inheritance, for their own lives, or for the life of a third person, or are jointly possessed of any chattel interest, the entire tenancy upon the decease of any of them remains to the survivors, and at length to the last survivor; and he shall be entitled to the whole estate, whatever it be, whether an inheritance, or a common freehold only, or even a less estate.

By statute of 1783, c. 52, s. 3, it was enacted, that the principle of survivorship should no longer be in force in this commonwealth. This statute however has been since repealed by statute, 1785, c. 62.

We will now consider how an estate in joint-tenancy may be severed and destroyed.

How such estate may be severed and destroyed.

The joint-tenants' estate may be destroyed, without any alienation, by merely disuniting their *possession*. For joint-tenants being seized by the *moiety* and by the *whole*, every thing that tends to narrow that interest, so that they shall not be seized throughout the whole, and throughout every part, is a severance or destruction of the jointure. And therefore, if two joint-tenants agree to part their lands, and hold them in severalty, they are no longer joint-tenants; for they have now no joint interest in the whole, but only a several interest respectively in the several parts. And for that reason also, the right of survivorship is by such separation destroyed. <sup>2 Bl. Com. 185.</sup>

By common law all the joint-tenants might agree to make partition of the lands, but one of them could not <sup>ibid.</sup> compel the other so to do: for this being an estate originally created by the act and agreement of the parties, the law would not permit any one or more of them to destroy the united possession, without a similar universal consent.

Stat. 1783, c. 62, s. 2.

But now, by statute, all persons having or holding any lands, tenements or hereditaments, as tenants in common, joint-tenants or coparceners, may be compelled, by writ of partition at the common law, to divide the same.

2 Bl. Com. 185.

The jointure may also be destroyed by destroying the unity of *title*. As if one joint-tenant conveys his estate to a third person: here the joint-tenancy is severed and turned into a tenancy in common; for the grantee and the remaining joint-tenant hold by different *titles*, (one derived from the original, the other from the subsequent grantor) though till partition made, the unity of possession continues.

So also may a joint-tenancy be converted into a tenancy in common, by the extension of an execution on the share of one of the joint-tenants.

Stat. 1783, c. 57, s. 2.

For by statute it is enacted, that when the real estate of the debtor or debtors, shall be held in joint-tenancy, in coparcenary or common, with the real estate of other persons, then the officer may extend execution on such debtor or debtors' real estate held as aforesaid, or part thereof, describing the same with as much precision as the nature and situation thereof will admit of, and give the creditor or creditors, his or their attorney, seizen or possession of such debtor or debtors' real estate held as aforesaid, or part thereof, to hold in common with the said other persons.

Sul. Hist. L. T. 169.

But where the creditor does not take the estate in the life-time of the joint-tenant, but suffers the estate to vest in the survivor, by the death of his co-tenant, the opportunity of severance, by operation of law in his favour, is over.

2 Bl. Com. 186.

So a devise of one's share by will is no severance of the jointure; for no testament takes effect till after the death of the testator, and by such death, the right of the survivor (which accrued at the original creation of the estate, and has, therefore, a priority to the other) is already vested.

The joint estate may also be destroyed by destroying <sup>Ibid.</sup> the unity of *interest*. And, therefore, if there be two joint-tenants for life, and the inheritance is purchased by or descends upon either, it is a severance of the jointure.

## II. TENANTS IN COMMON.

Tenants in common are such as hold by several and distinct titles, but by unity of possession; because none knoweth his own severalty, and, therefore, they all occupy promiscuously. This tenancy happens, therefore, where there is a unity of possession merely, but, perhaps, an entire disunion of interest, of title and of time. For if there be two tenants in common of lands, one may hold his part in fee-simple, the other in tail, or for life; so that there is no necessary unity of interest: one may hold by descent, the other by purchase; or the one by purchase from A, the other by purchase from B; so that there is no unity of title: one's estate may have been vested fifty years, the other's but yesterday; so that there is no unity of time. The only unity there is, is that of possession. <sup>Ibid. 192.</sup>

Tenants in common, like joint-tenants, are compelled, by statute, to make partition of their land; which <sup>Stat. 1785, c. 62, s. 2.</sup> they were not at common law. <sup>2 Bl. Com. 194.</sup>

They properly take by distinct moieties, and have no <sup>Ibid.</sup> entirety of interest; and, therefore, there is no survivorship between tenants in common.

Tenants in common are liable to reciprocal actions of waste and account. <sup>Stat. 1785, c. 62, s. 1 and 2.</sup>

So if one actually turns the other out of possession, an <sup>Ibid.</sup> action of ejectment will lie against him. <sup>2 Bl. Com. 194.</sup>

Estates in common can only be dissolved two ways:

1. By uniting all the titles and interests in one tenant, by <sup>Ibid.</sup> purchase or otherwise; which brings the whole to one severalty: 2. By making partition between the several tenants in common, which gives them all respective severalties. For indeed tenancies in common differ in

nothing from sole estates, but merely in the blending and unity of possession.

### III. COPARCENERS.

*Ibid.* 187.

An estate in coparcenary is, where lands of inheritance descend from the ancestor to two or more persons. These co-heirs are called coparceners; or, for brevity, *parceners* only.

Stat. 1785, c. 62, s. 1  
and 2.

Coparceners, like joint-tenants and tenants in common, may be compelled to make partition. And are also liable for waste.

## APPENDIX.

### Nº. I.

No. I.

*Warrant for summoning a jury in the process of FORCIBLE ENTRY AND DETAINER.*

COMMONWEALTH OF MASSACHUSETTS.

(L. S.) S—, ss.  
To the Sheriff of the county of S—,

Greeting.

WHEREAS complaint is made to us the subscribers, two of the Justices of the Peace for and within the county of S <sup>Form.</sup> *quorum unus*, by A. B. of D. in the same county, gentleman, that E. F. of yeoman, upon the day of at D. aforesaid, with force and arms, and with a strong hand, did unlawfully and forcibly enter into and upon a tract of land of him, the said A. B. in D. aforesaid, containing acres, bounded as follows, viz. (or into the messuage or tenement of him, the said A. B. as the case may be) and him, the said A. B. with force and a strong hand as aforesaid, did expel and unlawfully put out of the possession of the same, [Or if it is a forcible detainer only, then the entry shall be described and the detainer inserted as follows:] and him, the said A. B. does unlawfully, unjustly and with a strong hand, deforce and still keep out of the possession of the same. You are therefore commanded, in behalf of the said Commonwealth, to cause to come before us upon the day of at in the said county, twelve good and lawful men of your county, each one of whom having a freehold of the yearly value of *Forty Shillings*, to be empannelled and sworn to inquire into the forcible entry and detainer (or the detainer) aforescribed. Given under our hands and seals the day of in the Year of our Lord

R. S. }  
N. O. } Justices of the Peace *quorum unus*.

### Nº. II.

No. II.

*Summons to the adverse party in the process of FORCIBLE ENTRY AND DETAINER.*

COMMONWEALTH OF MASSACHUSETTS.

(L. S.) S—, ss.  
To the Sheriff of the county of S—,

Greeting.

WE command you, that you summon E. F. of to appear <sup>Form.</sup> before the subscribers, two of our Justices of the Peace, within and for our said county of S *quorum unus*, at a place called in D in the said county, at o'clock in the noon;

then and there to answer to and defend against the complaint of *A. B.* to them exhibited, wherein he complains that [Here the complaint shall be recited] and you are to make a return of this writ, with your doings therein, unto our said Justices, upon or before the said day

Witness our said Justices, the                      day of                      in the Year of our Lord

*R. S.*  
*N. O.*

No. III.

N<sup>o</sup>. III.

*Jurors' Oath in the process of FORCIBLE ENTRY AND DETAINER.*

FOREMAN'S OATH.

Foreman's oath.

"YOU as foreman of this jury do solemnly swear, that you will well and truly try whether the complaint of *A. B.* now laid before you, is true according to your evidence. *So help you God.*"

THE OTHER JUROR'S OATH.

The other juror's oath.

"THE same oath which your foreman hath taken on his part, you and every of you shall well and truly observe and keep. *So help you God.*"

No. IV.

N<sup>o</sup>. IV.

*Form of the Verdict in the process of FORCIBLE ENTRY AND DETAINER.*

Form of their verdict.

AT a Court of Inquiry held before *R. S.* and *N. O.* Esquires, two of the Justices of the Peace, within and for the said county of *S* *quorum unus*, at *D.* in the said county of *S.* upon the                      day of                      in the Year of our Lord                      the Jury upon their oaths do find, that the lands or tenements in *D.* aforesaid, bounded (or described) as follows, as in the complaint upon the day of                      in the Year of our Lord                      was in the lawful and rightful possession of the said *A. B.* and that the said *E. F.* did upon the same day unlawfully with force and arms, and with a strong hand, enter forcibly upon the same (or being lawfully upon the same, did unlawfully with force and a strong hand) expel and drive out the said *A. B.* and that he doth still continue wrongfully to detain the possession from him, the said *A. B.* Wherefore the Jury find upon their oaths aforesaid, that the said *A. B.* ought to have restitution thereof without delay.

No. V.

N<sup>o</sup>. V.

*Form of the writ of Restitution in the process of FORCIBLE ENTRY AND DETAINER.*

COMMONWEALTH OF MASSACHUSETTS.

(L. S.)

*S*—, ss.

To the Sheriff our county of *S*—,

Greeting.

Form of the writ.

WHEREAS at a Court of Inquiry of forcible entry and detainer, held at *D.* in our county of *S.* upon the                      day of                      in

the year of our Lord, before *R. S.* and *N. O.* Esquires, two Justices of the Peace for our said county of *S. quorum unus*, the jurors empannelled, and sworn by our said Justices, did return their verdict in writing, signed by each of them, that *A. B.* was upon the day of in the rightful possession of a certain messuage or tract of land (as in the verdict returned) and that, &c. (as in the verdict) whereupon it was considered by our said Justices, that the said *A. B.* should have restitution of the same. We therefore command you, that taking with you the force of the county if necessary, you cause the said *E. F.* to be forthwith removed from the premises, and the said *A. B.* to have the peaceable restitution of the same; and also that you levy of the goods, chattels or lands of the said *E. F.* the sum of being costs taxed against him on the trial aforesaid, together with *one shilling and four pence* more for this writ and your own fees; and for want of such goods, chattels or lands, of the said *E. F.* by you found, you are commanded to take the body of the said *E. F.* and him commit to our gaol, in *L.* in our said county of *S.* there to remain until he shall pay the sum aforesaid, together with all fees arising on the service of this writ, or until he is delivered by order of law, and make return of this writ, with your doings therein, within twenty days next coming. Witness our said Justices, at *D.* aforesaid, the day of in the year of our Lord *R. S.*  
*N. O.*

## No. VI.

No. VI.

Form of the writ of HABEAS CORPUS CUM CAUSA.

COMMONWEALTH OF MASSACHUSETTS.

(L. S.) *S.* ss.  
To

WE command you that the body of *A. B.* of in our prison under your custody, (or by you imprisoned and restrained of his liberty, as the case may be) as it is said, together with the day and cause of his taking and detaining, by whatsoever name the said *A. B.* shall be called or charged, you have before our Justices of our Supreme Judicial Court, holden at *B.* within and for the county of *S.* immediately after the receipt of this writ, to do and receive what our said Justices shall then and there consider concerning him (or her) in this behalf; and have there this writ. Witness, *W. C.* Esq. at *B.* this day of in the year of our Lord

Greeting. Form of the writ.

Clerk.

## No. VII.

No. VII.

Form of the precept for selling impounded swine.

(L. S.) *S.* ss. To either of the Constables of the town of

WHEREAS *A. B.* of *B.*, in the county of *S.*, (*addition*) has this day given me information, that on the day of he found a swine [here insert the marks, natural and artificial if any, and such a description of the size and age, as can conveniently be done] owned by *C. D.* of (*addition*) going at large in said town of *B.*, against the statute in that case pro-

Greeting. Form of a precept for selling swine impounded.

vided; whereby the said *C. D.* forfeited the sum of *one shilling*; for the recovery of which he impounded the same swine, and within twenty-four hours then next following, gave him notice thereof in writing (or left a notification thereof at his dwelling house, as the case may be) and although three full days have elapsed since the impounding, yet he has not paid the said forfeiture and charges, nor has he replevied the same swine (or in case the owner is unknown, after the description of the swine, its marks natural and artificial, let it be inserted, belonging to some person unknown at the time of impounding, going at large against the statute in that case provided, whereby the owner forfeited the sum of *one shilling*, for the recovery of which he impounded the same swine, and within twenty-four hours then next following, caused notifications of the time, place and cause of impounding, to be posted up agreeably to the directions of the law in such cases; and although three full days have elapsed since the impounding, no person hath appeared to pay the said forfeiture and charges, or replevied the same swine,) as by the information by him signed and sworn unto, with me now remaining, appears:

These are therefore, in the name of the Commonwealth of *Massachusetts*, to will and require you, after you have posted up notifications of the time and place of sale, twenty-four hours beforehand, to sell and dispose of the said swine, at such time and place as you shall have thus appointed, to the highest bidder; and from the monies arising upon the sale, you are to pay the said *A. B.* *one shilling*, for the said forfeiture, and *shillings* and *pence*, by me allowed, for his cost, charges and expenses (according to the bill annexed) and *one shilling* and *six pence* more for this precept, amounting in the whole to *shillings* and *pence*. And the surplus arising from such sale, deducting *three shillings* and *six pence* for your own fees on the business, you are to pay over to the Town Treasurer of *B*——, to be disposed of as the law directs; and you are also directed to deliver the said Treasurer a copy of the information of the said *A. B.* as it is recited herein, together with a certificate of the date of this process: And of this precept, with your doings hereon, you are to make return into the office of the Town Clerk of *B*——, in fourteen days from this time. Given under my hand and seal, this                      day of  
*Anno Domini*

No. VIII.

No. VIII.

*Oaths of imprisoned Debtors.*

## WHEN COMMITTED FOR A PRIVATE DEBT.

I            do solemnly swear, before Almighty God, (or affirm, as the case may be,) that I have not any estate, real or personal, in possession, reversion, or remainder, sufficient to support myself in prison, or to pay prison charges; except the goods and chattels exempted from attachment and execution, by an Act, entitled, "An Act to exempt certain goods and chattels of debtors from attachment and execution;" and that I have not, since the commencement of this suit against me, or at any other time, directly or indirectly, sold, leased, or otherwise conveyed, or disposed of to, or entrusted any person or persons whomsoever, with all or any part of the estate, real or personal, whereof I have been the lawful owner or possessor, with any intent or design to secure the same, or to receive or to expect any profit or advantage therefor;

or have caused or suffered to be done, any thing else whatsoever, whereby any of my creditors may be defrauded. So help me God ; or (this I do under the pains and penalties of perjury) as the case may be.

## WHEN COMMITTED FOR TAXES.

I do solemnly swear before Almighty God, [*or I do affirm, as the case may be*] that I had not at the time of my imprisonment by (*naming the said Collector or Constable*) nor have I at this time, any lands, goods, money or demands, whereby to satisfy the sum at which I am assessed in the list or warrant of taxes committed to him to collect, and for which I am now holden in prison, or for the payment of any part of that sum, my necessary apparel and some other articles not liable to be distrained for taxes, and what has been expended for my necessary support while in prison, only excepted ; nor have I at any time before or since my said imprisonment, disposed of, or entrusted to any person or persons, any estate, either real or personal, whereby to avoid such payment. *So help me God,* (or this I do under the pains and penalties of perjury, in case of affirming as aforesaid.)

## No. IX.

No. IX.

*Form of the Justices' Certificate that the Oath has been Administered to an Imprisoned Debtor.*

## IN THE CASE OF A PRIVATE DEBT.

S—— ss.

To

*Keeper of the Gaol at*

WE, the subscribers, two of the Justices of the Peace for the said county of *S.* and each of us of the Quorum, hereby certify, that *A. B.* a poor prisoner, confined upon execution for debt, in the gaol at *C.* aforesaid, hath caused *D. E.* the creditor, at whose suit he was so confined, to be notified according to law, of his, the said *A. B.*'s desire of taking the benefit of an Act, entitled, "An Act for the relief of poor prisoners, who are committed by execution for debt ;" that, in our opinion, the said *A. B.* hath not any estate, either real or personal, sufficient to support himself in prison, and that he hath not conveyed or concealed his estate with design to secure the same to his own use, or to defraud his creditors, and that we have, after due caution to the said *A. B.* administered to him the oath (or affirmation) prescribed in the Act aforesaid. Witness our hands and seals this      day of      *Anno Domini*

## IN THE CASE OF TAXES.

S—— ss.

To

*Keeper of the Gaol at C——.*

WE the subscribers, two of the Justices of the Peace and of the Quorum, for the county of *S.* hereby certify, that *A. B.* a poor prisoner confined by warrant for taxes in the gaol at *C.* aforesaid, hath caused the assessors of the town, district or parish (as the case may be) by virtue of whose warrant the said *A. B.* was so confined, and also      (*naming said Constable or Collector who executed such warrant*) to be notified according to law, of the said *A. B.*'s desire of taking the benefit of an act, entitled "An Act for the relief of poor prisoners confined in gaol for taxes," and no sufficient cause to the contrary being shewn—We have, after due caution

and examination of the said *A. B.* administered to him the oath or affirmation prescribed in the act aforesaid. Witness our hands and seals, this            day of            Anno Domini,

No. X.

N<sup>o</sup>. X.

*Selectmen's Certificate in recommendation of Innholders and Retailers.*

WE, the subscribers, Selectmen of the town (or district) of            do approve of            (inserting the name of the person and the employment for which he or she is approbated) in the said town (or district) for the year ensuing; and we do hereby recommend the said            as a person of sober life and conversation, suitably qualified and provided for the exercise of such an employment, and firmly attached to the constitution and laws of this Commonwealth.

No. XI.

N<sup>o</sup>. XI.

*Oath to be taken by Innholders and Retailers.*

I, *A. B.* do swear, that I will bear true faith and allegiance to the Commonwealth of *Massachusetts*, and that I will, to the utmost of my power, defend the Constitution and Government thereof, against traitorous conspiracies, and all hostile and violent attempts whatsoever.

No. XII.

N<sup>o</sup>. XII.

*Coroner's Warrant for a Jury.*

(L. S.) *Suffolk, ss.*  
To either of the Constables of *B*—, in the said county of *S*—, Greeting.

THESE are in the name of the Commonwealth of *Massachusetts*, to require you immediately to summon and warn            good and lawful men of the said town of *B*            to appear before me, one of the Coroners of the said county of *S*            at the dwelling-house of            or at a place called            within the said town of *B* at the hour of            then and there to inquire upon the view of the body of            there lying dead, how and in what manner he came to his death.

Fail not herein at your peril. Given under my hand and seal, at *B*            the            day of            in the year of our Lord,            W. G.

No. XIII.

N<sup>o</sup>. XIII.

*The Oath to be administered to a Coroner's Jury.*

FOREMAN'S OATH.

YOU solemnly swear, that you will diligently inquire and true presentment make on behalf of this Commonwealth, how and in what manner *A. B.* who lies here dead, came to his death; and you

shall deliver up to me, one of the Coroner's of this county, a true inquest thereof, according to such evidence as shall be laid before you, and according to your knowledge. *So help you God.*

## THE OTHER JURORS' OATH.

SUCH oath as your foreman hath taken, you, and each of you, shall well and truly observe and keep. *So help you God.*

N<sup>o</sup>. XIV.

No. XIV.

*Oath to be administered by Coroners to Witnesses.*

YOU solemnly swear, that the evidence which you shall give to this inquest concerning the death of *A. B.* here lying dead, shall be the truth, the whole truth, and nothing but the truth. *So help you God.*

## Nos. XV, and XVI.

Nos. XV, and XVI.

*Form of a Coroners' Inquisition.*

*Suffolk, ss.* { AN inquisition taken at *B* within the said  
                  { county of *S* the day of       in the year  
of our Lord       before *W. G.* gentleman, one of the Coroners of  
the said county of *S* upon the view of the body of *A. B.* there  
lying dead, by the oaths of       yeomen, good and lawful men, who  
being charged and sworn to inquire for the Commonwealth, when,  
how, and by what means the said *A. B.* came to his death, upon  
their oaths do say

[*Then insert how, when, and by what means, with what instrument he was killed, and if it appears that he hath been murdered by a person known, then the inquisition shall be concluded in this form :*] *to wit.*

And so the jurors aforesaid, upon their oaths aforesaid, do say, that the aforesaid *A. B.* in manner and form aforesaid, then and there of his malice aforethought, did kill and murder, against the peace and dignity of the Commonwealth, and the laws of the same,

[*If it appears to be self-murder, then shall the inquisition be concluded thus :*]

And so the jurors aforesaid, thus upon their oaths aforesaid, do say, that the said *A. B.* in manner and form aforesaid, then and there voluntarily and feloniously as a felon of himself, did kill and murder himself, against the peace.

[*And if it appears that the death was by misfortune :*]

And so the jurors aforesaid, upon their oaths say, that the said *A. B.* in manner aforesaid, came to his death by misfortune.

[*If innocently by the hands of any person :*]

The jurors upon their oaths aforesaid, do say, that the aforesaid *D. R.* the aforesaid *A. B.* by misfortune, and against and contrary to the will of him the said *D. R.* in manner and form aforesaid, did

## APPENDIX.

kill and slay. In witness whereof the said Coroner and jurors to this inquisition have set their hands and seals, the day and year abovesaid.

No. XVII.

Nº. XVII.

*Oath to be administered by Commissioners of an insolvent estate to a creditor of such estate.*

YOU do swear (or affirm, as the case may be) that you will make true answers to the questions which shall be asked you by the Commissioners relative to your claim against the estate of (naming the deceased insolvent debtor) now under consideration, *So help you God*, (or, this you do under the pains and penalties of perjury, as the case may be.)

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